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In The

Supreme Court of the United States

October Term, 1963

No. 749

JOHN J. KELLER,

Petitioner,

vs.

STATE OF WISCONSIN ex rel.
STATE BAR OF WISCONSIN,
an association,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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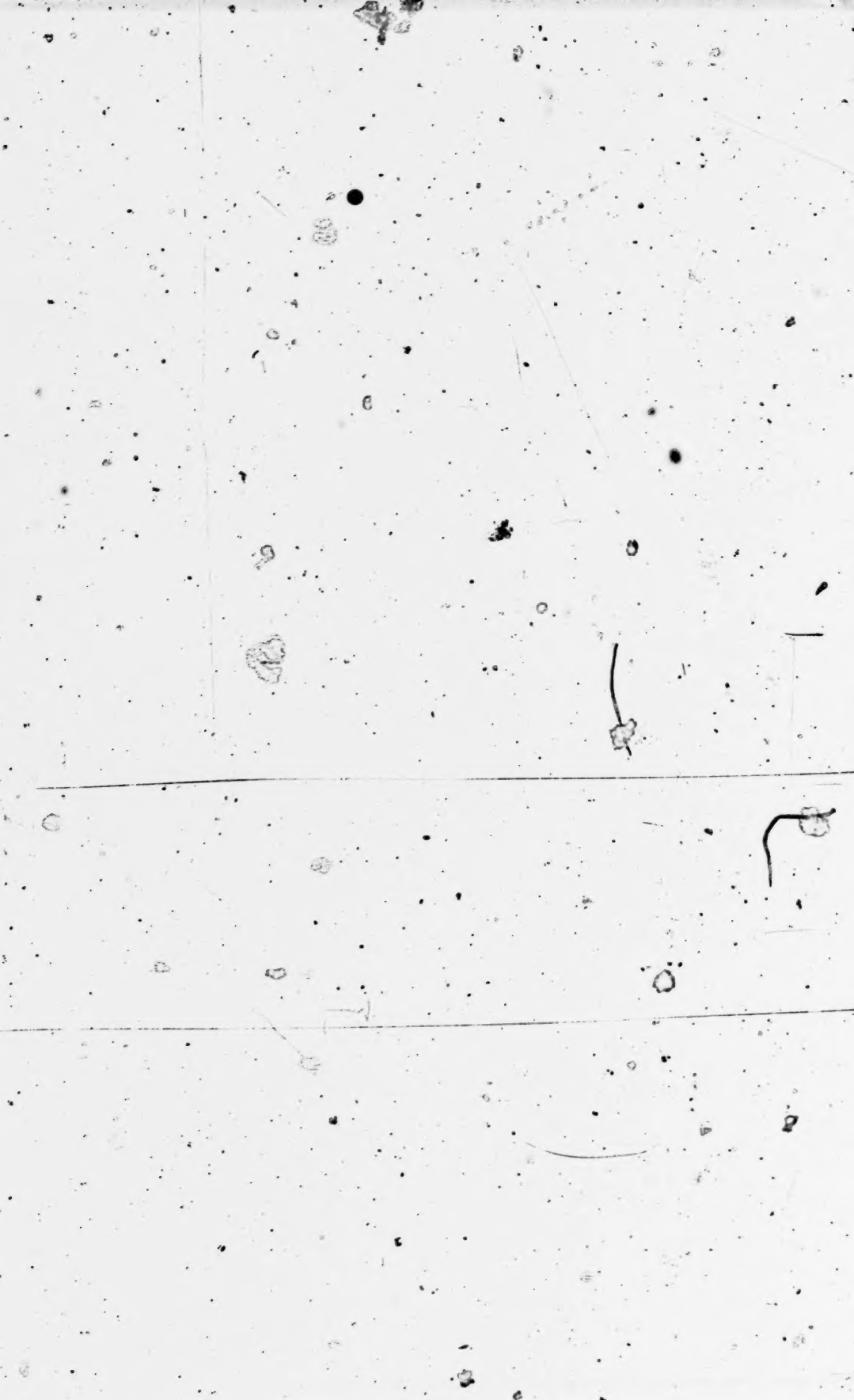

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Wisconsin entered in the above-entitled case.

DECISION AND OPINION OF THE COURTS BELOW

The decision and opinion of the Wisconsin Supreme Court herein sought to be reviewed bears its case number 193 for the August Term, 1961 and is reported in 21 Wis. 2d 100. This decision is one given on reconsideration after remand from The Supreme Court of the United States on June 10, 1963 upon *writ of certiorari* reported in 374 U. S. 102, 83 Sup. Ct. 1686, 10 L. Ed. (2d) 1026.

The *writ of certiorari* was issued and vacated the previous decision of the Supreme Court of Wisconsin in the instant case which was reported in 16 Wis. 2d 377, 114 N. W. 2d 796.

(The decision on reconsideration, order on certiorari and original decision are all set forth in Appendix B.)

JURISDICTION

The Wisconsin Supreme Court rendered it's decision on reconsideration on October 25, 1963. No further procedural remedies are available under Wisconsin practice. This petition is filed within 90 days from said date. The jurisdiction of this court is invoked under 28 U. S. C. Section 1257(3); and under Rule 19(1) (a) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

I. Can a state, without violating Article I, Section 8, of the United States Constitution, limit or deny a federally licensed I. C. C.[1] practitioner's right to engage in federally authorized I. C. C. activities within that state solely because such practitioner is not licensed by that state to practice law therein?

II. Can a state court, without violating due process of law as guaranteed by the 14th Amendment of the U. S. Constitution, prohibit a non-lawyer from engaging in state administrative agency transportation activities solely because he does not have a state license to practice law when the state legislature has specifically authorized such activities by non-lawyers and the non-lawyer has for many years openly engaged in such authorized activities as a means of earning his livelihood?

III. Can a state court, without violating due process of law as guaranteed by the 14th Amendment of the U. S. Constitution, require that those who engage in state administrative agency transportation activities must first be licensed by that state to practice law?

IV. Can a state court, without violating due process and equal protection of the law as guaranteed by the 14th Amendment of the U. S. Constitution, prohibit an admittedly qualified person from engaging in state administrative agency transportation activities?

V. Can a state court, without violating equal protection of the laws as guaranteed by the 14th Amendment of

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[1] Interstate Commerce Commission

the United States Constitution, permit one profession to practice law without a license and yet prohibit another profession from practicing law because it does not have a license?

STATEMENT OF THE CASE

Petitioner is an adult resident of Neenah, Wisconsin whose primary, usual and ordinary business is the representation of transportation clients in Interstate Commerce under license issued him by the I. C. C. Petitioner is also authorized by Wisconsin Statutes and the Wisconsin Administrative Code to represent transportation clients in and before the Wisconsin Motor Vehicle Department and the Wisconsin Public Service Commission, and has openly done so for many years under such authority. Petitioner is not licensed by the State of Wisconsin to practice law nor does he practice law in or appear before any courts or judicial tribunals in Wisconsin or elsewhere.

Petitioner has been licensed by the I. C. C. of the United States Government to represent transportation clients before said Commission in all matters relating to interstate transportation operations, he being so licensed on October 4, 1951, and is a member in good standing of said Commission's Bar since said date. Petitioner obtained his license to practice before the I. C. C. by passing a written examination which tested his qualifications and knowledge as to (1) structure and history of the Interstate Commerce Act, as amended, and related acts, (2) the Commis-

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Hereinafter abbreviated W. S. A. [1]

Hereinafter abbreviated W. P. S. C.

sion's Rules of Practice, (3) the general rules of evidence, (4) the leading cases involving the Commerce Clause of the United States Constitution and the Interstate Commerce Act and their significance and (5) the principal of legal ethics. Petitioner's I. C. C. license permits him to prepare applications for filing with that Commission, to appear at hearings before said Commission with the presentation of appropriate facts to support granting of such applications, and to appear and file with said Commission all appropriate bilateral contracts, lease arrangements, rate schedules, tariffs, registration of equipment and related documents all dealing with transportation matters in interstate commerce.

The W. M. V. D. and the W. P. S. C. do not issue licenses, as such, to those who practice before their agencies but do permit non-lawyers to so practice who meet their qualifications pursuant to authority given them by Wisconsin Statutes. Petitioner has, for many years, represented both interstate and intrastate transportation clients in and before these state administrative agencies with their permission. Certain of his appearances, acts and activities therein are in direct continuance or completion of services rendered for said clients in interstate commerce, to wit, obtaining of conforming authority or compliance authority from the W. P. S. C. and registration of interstate equipment and the preparation and filing of appropriate leases of interstate equipment with the W. M. V. D. and as such are a part of petitioner's usual and ordinary interstate commerce business. All othes appearances, acts and activities in and before the W. P. S. C. and W. M. V. D. relate solely to intrastate transportation and consist of preparing and filing necessary documents pertaining to the

leasing of intrastate equipment, filing of intrastate rate schedules and tariffs, the appearance at hearings before the W. P. S. C. with the presentation of appropriate facts to support granting of intrastate transportation applications and preparing and filing other intrastate documents as required by said Wisconsin administrative agencies.

On September 7, 1960, respondent, the Wisconsin Attorney General, on the relation of the Integrated State Bar of Wisconsin commenced a quo warranto action in the Wisconsin Circuit Court for Winnebago County alleging, in substance, that this petitioner had usurped the franchise of practicing law by representing transportation clients before state administrative agencies and the I. C. C. because he did not have a Wisconsin license to practice law, and praying that petitioner's alleged activities be enjoined. (31a-35a)

Petitioner demurred to respondent's complaint alleging, in substance, that said complaint complained of, inter alia, activities occurring outside the State of Wisconsin over which Wisconsin had no jurisdiction (36a) Respondent promptly amended its complaint and confined its allegations to activities occurring solely within Wisconsin. (37a-42a)

Petitioner then answered respondent's amended complaint, in substance, admitting the activities complained of but denied that they constituted the illegal or unauthorized practice of law; alleged that petitioner's activities were authorized by the Wisconsin Legislature and its agencies and the United States Congress and its agency, the I. C. C., and hence were not illegal or unauthorized; that petitioner was

well qualified by training, examination and experience to engage in the activities complained of against him; and that to enjoin petitioner from continuing those authorized activities would deny him due process and equal protection of the law as guaranteed by the Wisconsin and United States Constitutions. (42a-45a)

Respondent then demurred to petitioner's answer praying for judgment according to the demand of his complaint. (46a) Meanwhile, petitioner moved for summary judgment asking that respondent's complaint be dismissed on the merits. (47a-51a)

The Circuit Court heard arguments on all of the pleadings and dismissed the respondent's complaint for lack of jurisdiction over the subject matter contending that it had no jurisdiction to hear controversies involving the alleged unauthorized practice of law. (51a)

From this order of dismissal, the respondent appealed to the Wisconsin Supreme Court. (52a) Respondent argued that the circuit court had jurisdiction over the subject matter and should have decided the case on the merits, but regardless of where jurisdiction lay, now that the case was before the Supreme Court, it should decide the case on the merits. Petitioner immediately moved the Wisconsin Supreme Court to strike the appeal as to the merits because the circuit court had never rendered a decision on the merits and they were, consequently, not appealable; only a question of jurisdiction being presented for appeal by the circuit court's order under Wisconsin law. (52a) Respondent also argued, (by brief) that if the Wisconsin Supreme Court heard the merits at that time,

he would be denied due process and equal protection of the laws under the Wisconsin and United States Constitutions because it would be contrary to Wisconsin's procedural law. Petitioner further moved that the respondent's appeal as to the jurisdictional question be dismissed and that the case be remanded to the circuit court because petitioner agreed with respondent's contention that the circuit court did have jurisdiction to hear alleged unauthorized practice of law cases and, hence, there was no dispute between petitioner and respondent on that issue. (52a) The Wisconsin Supreme Court, after arguiment, denied both of petitioner's motions for dismissal and thereafter heard respondent's appeal. (52a)

The Wisconsin Supreme Court handed down its decision on appeal and reversed the Circuit Court, holding that the circuit court did have jurisdiction to hear alleged unauthorized practice of law cases and further, directed the circuit court to enter an injunction against petitioner restraining him:

> "(a) From the giving of legal advice and instruction to clients to inform them of their rights and obligations;
>
> "(b) From the preparation for clients of documents requiring knowledge of legal principals not possessed by ordinary laymen; and,
>
> "(c) From appearing as an advocate asserting legal rights for a clients before public tribunals which posse power and authority to determine the rights of such clients according to law"

The Wisconsin Supreme Court's opinion acknowledged that petitioner's activities had been authorized and that he was

admittedly qualified to engage in these activities. Nevertheless, the court was of the opinion that these activities constituted the practice of law for which petitioner did not have a license, and hence, must be enjoined. The court justified its holding by reversing prior Wisconsin law and declaring that the Wisconsin judiciary has the sole and exclusive right to determine what constitutes the practice of law and who may engage in same. (10a-21a)

Petitioner made timely motion for rehearing (53a) again contending, (by brief) in substance, that petitioner's activities had been authorized and, consequently, could not constitute the unauthorized or illegal practice of law; that the court's decision deprived petitioner of his constitutional rights to due process and equal protection of the law as guaranteed by the United States Constitution and further violated Article I, Section 8 of the United States Constitution; and that the courts claim to exclusive and sole jurisdiction over the practice of the law usurped a legislative function and was in violation of the Separation of Powers Doctrine of the Wisconsin Constitution. Petitioner's motion for rehearing was denied with opinion. (46a)

Petitioner then petitioned the Supreme Court of the United States for a writ of Certiorari to the Supreme Court of Wisconsin from said decision said petition being docketed September 12, 1962 in the Supreme Court of the United States as case No. 429, October Term, 1962.

On June 10, 1963 the Supreme Court of the United States granted the petitioner's writ of Certiorari, the order granting the same being reported in 374 U. S. 102, 83 S. Ct. 1686, 10 L. Ed. (2d) 1026 and read as follows:

"PER CURIAM

"The petition for writ of Certiorari is granted, the judgment is vacated and the case is remanded to the Supreme Court of Wisconsin for reconsideration in light of *Sperry v. Florida ex rel. Florida Bar*, 373 U. S. 379."

Upon remand to the Supreme Court of Wisconsin, petitioner moved the Supreme Court of Wisconsin on said reconsideration to dismiss the appellant State Bar of Wisconsin's complaint on it's merits or in the alternative to provide that any decision to the contrary be inapplicable to petitioner and to be applicable prospectively only to non-attorney agents not actively engaged in practice before the Wisconsin Public Service Commission on May 1, 1962, the date of the Supreme Court of Wisconsin's first decision in this matter.

Memorandum briefs were submitted to the state court of Wisconsin by petitioner contending that in the light of the Sperry Decision the decision of May 1, 1962 of the State Supreme Court of Wisconsin in the instant matter sustained petitioner's prior arguments that the Supreme Court of Wisconsin had no authority to either deny or limit a federally authorized interstate commerce practitioner from practicing his activities within the State of Wisconsin and further that it sustained petitioner's prior argument that a qualified layman could practice before administrative agencies if authorized by said agency and the legislative body authorized to empower such practice and that it sustained petitioner's position that having been permitted to so practice by the state legislature and state administrative bodies the action of the Supreme Court of Wisconsin

in it's May 1, 1962 decision was a denial of due process and equal protection under the United States Constitution as well as contrary to the Constitution of the State of Wisconsin and arbitrary and discriminatory.

The Supreme Court of Wisconsin summarily denied petitioner's motions.

At the same time the appellant State Bar of Wisconsin presented a motion to the effect that the Supreme Court of Wisconsin merely amend it's May 1, 1962 decision by adding a paragraph to the effect that the restraining order issued against petitioner should not be construed as enjoining him from performing tasks he may lawfully perform under any license issued to him by the Interstate Commerce Commission.

Petitioner objected to this on the grounds that it was contrary to the order of the Supreme Court of the United States on it's writ of Certiorari in that the order granting said writ completely vacated the decision of the Supreme Court of Wisconsin and directed it to fully reconsider the case in the light of the Sperry Decision.

The Supreme Court of Wisconsin then ordered oral argument on the motion of appellant State Bar of Wisconsin primarily for the purpose of determining what activities of petitioner might be incidental to his Interstate Commerce Commission license.

The decision of the Supreme Court of Wisconsin dated October 25, 1963 was then rendered by said court.

Petitioner now again makes this petition for writ of certiorari on the premise that the Supreme Court of Wis-

consin did not fully reconsider the issues in this case in the light of the Sperry Decision and that it's decision of October 25, 1963 is contrary to the intent of the Supreme Court of the United States in it's order of June 10, 1963 vacating the decision of the Supreme Court of Wisconsin dated May 1, 1962.

ARGUMENT

(1) A state may not limit or deny the privileges granted by a federally authorized ICC license.

This first issued seemed clearly answered by the mandate on the previous petition for Writ of Certiorari in the instant case.

As set forth in said petition, Congress has this power under Article I, Section 8 of the United States Constitution. Pursuant thereto, Congress enacted 49 USC Section 17(1) relating to practice before the ICC as follows:

> "ADMISSION TO PRACTICE—the Commission is authorized to promulgate reasonable rules and regulations relating to admission to practice before it . . ."

Pursuant to this congressional authority, the I. C. C. enacted Rule 8 of it's rules of practice which are contained in the Appendix to F. C. A. 49. Rule 8 declares:

> "The following classes of persons whom the Commission finds, upon consideration of their application, to be of good moral character and possess the requisite qualifications to represent others may be admitted to practice before the Commission: (a) Attorneys-at-law —(b) PERSONS NOT ATTORNEYS—any person not

an attorney-at-law who is a citizen or resident of the United States and who shall satisfy the Commission that he is possessed of the necessary legal and technical qualifications to enable him to render valuable services before the Commission and that he is otherwise competent to advise and assist in the presentation of matters before the Commission."

All non-attorney applicants are given written examinations of their qualifications. Petitioner has taken such written examination, has so qualified and has been licensed by the I. C. C.

Our previous petition cited *Gibbons vs. Ogden* 9 Wheaton 1; *Johnson vs. Maryland* 254 U. S. 51 and *McCulloch vs. Maryland* 4 Wheaton 316 in support of our position.

In the Sperry Case, the Supreme Court of the United States cited *Gibbons vs. Ogden* and *Pennsylvania vs. Wheeling & B. Bridge Co.* 13 How. 518, 566 in support of this position.

Notwithstanding the apparent clarity of these authorities, and the mandate in the instant case, the Supreme Court of Wisconsin has again, in its October 25, 1963 decision placed limitations on petitioner's right to carry out the activities that he has been authorized to performed by Congress and the Interstate Commerce Commission.

While on the surface the decision may seem to conform with this aspect of the Sperry Case, analysis of it is clear that it does not.

We call the court's attention to the statement in regard to the petitioner's right to draw leases and contracts that

must be approved by the Interstate Commerce Commission as follows: (7a)

> "He (counsel for Keller) also apparently takes the position that where leases and contracts must be approved by the Interstate Commerce Commission, such leases and contracts may be drawn by a practitioner licensed by that Commission. We do not consider either contention correct. Although we recognize that he may advise whether a particular lease or contract complies with federal law or regulations, leases and contracts create substantive rights and obligations of parties and to prepare them and advise concerning their significance other than their standing under the Interstate Commerce laws and regulations would constitute the practice of law outside the scope of his practice before the Interstate Commerce Commission."

Further, in the injunction, we call the court's attention to the fact that instructions were that it should be drawn so that Keller (petitioner) is not enjoined from specified activities. The substance of the language is that he is not enjoined insofar as he prepares a procedural application or document but that he is enjoined if he prepares a document that has substantative foundation.

It is petitioner's contention that this language and form of injunction constitutes a limitation upon the privileges permitted him under his I. C. C. license.

By illustration, we point out that there are different classes of carriers in Interstate Commerce. We have the common carrier, contract carrier and private carrier. Petitioner, under his I. C. C. License, has just as much right to represent contract carriers as he does common carriers. Likewise as much right to present private carriers. In con-

nection with the latter two classes, contracts are necessary. In fact, before a permit can be issued to a contract carrier, a bilateral contract in a form approved by the Interstate Commerce Commission must be filed. To deny petitioner the right to prepare this bilateral contract is a denial of his interstate commerce license privileges.

The Interstate Commerce Commission has promulgated specific rules pertaining to leasing. It is part of the petitioner's work in the furtherance of his activities under his Interstate Commerce Commission license to prepare the necessary leases for the carriers that he represents. These leases can be long term; trip; equipment; owner-operator; or numerous other varieties. The type of lease required depends upon the need of the carrier under the circumstances. The sufficiency of the lease is governed by a variety of specified rules. The injunction ordered by the Supreme Court of Wisconsin which would prevent the preparation of these is definitely a denial of his right to carry on interstate commerce practice as authorized by this license.

The above two illustrations clearly show the refusal of the Supreme Court of Wisconsin to follow the mandate from the prior writ of certiorari in this matter and we respectfully request that this court now grant this further petition of certiorari with specific directions that the decision and proposed injunction of October 25, 1963 in the instant case be vacated insofar as it in any way whatsoever limits petitioner's right to carry on the activities authorized by his Interstate Commerce Commission License.

(2) Activities before Wisconsin Public Service Commission:

Petitioner's activities before the state Public Service Commission are strictly in respect to transportation. Some of the activities are in furtherance of his interstate commerce practice in that Wisconsin requires that any interstate carrier operating in or through Wisconsin obtain certificates, licenses and amendments thereto from its Public Service Commission before operating in Wisconsin. Issuance of these is strictly procedural, normally involving an application with a filing fee and a copy of the Interstate Commerce Commission authority upon which the Wisconsin conforming authority is based. Likewise, Wisconsin law requires interstate carriers to display certain permits and other licensing is required. Again most of this is procedural.

Petitioner has been performing these activities in the past for at least ten years without any objection or complaint and pursuant to existing Wisconsin law.

Likewise, petitioner, because of his special qualifications in the transportation field on an interstate basis, has handled matters that are solely intrastate within Wisconsin, much of it being for his interstate transportation clients. Again, this has been without objection and pursuant to existing Wisconsin law.

In the instant case this writer, on behalf of petitioner, continually argued to the Wisconsin Supreme Court that as petitioner had been authorized to perform these activities before the State Commissions, the enjoining him from continuing them by this action was a denial of due process and

a violation of the equal protection laws of Article XIV Amendment to the United States Constitution.

Upon the remand of the instant matter on the original petition for certiorari, we again argued that in light of the Sperry Case these arguments were true. We set them forth again as follows:

(a) Due process:

Article IV of the Wisconsin Constitution (56a) provides that the Legislative power shall be vested in a Senate and Assembly.

Article VII of the Wisconsin Constitution (56a) provides that the judicial power of the state as to matters of law and equity shall be vested in a supreme court, circuit coutrs, courts of probate and in justices of the peace. It then continues to define the limits of the various powers.

Article VII, Section 20 of the Wisconsin Constitution (57a) states as follows:

> "Any suitor, in any court of this state, shall have the right to prosecute or defend his suit either in his own proper person, or by an attorney or agent of his choice."

Pursuant to it's legislative power the Senate and Assembly of Wisconsin established the Public Service Commission.

In Section 227.01(1) Wisconsin Statutes (57a) it defined "agency" as any board or commission, committee, department or officer in the state government except the governor or any military or judicial officer of this state.

In Section 227.08 Wisconsin Statutes, (57a) the legislature provided that each agency shall adopt rules governing the form, content, and filing of pleadings, the form, content and service of notice, and the conduct of pre-hearing conferences, and all other necessary rules of procedure and practice.

In Section 195.03(1) Wisconsin Statutes (57a) (applicable to Public Service Commission) the legislature stated that the Commission shall have the power to adopt rules to govern it's proceedings and to regulate the mode and manner of all investigations of hearings, and all hearings shall be open to the public.

The Public Service Commision of Wisconsin, pursuant to the foregoing authority provided Rule P. S. C. 2.32(1) set forth in Appendix 59a as follows:

> "A person desiring to participate in a proceeding, whether on his own behalf or as an authorized agent or attorney, shall enter his appearance by giving his name and address and the name of any party he represents and in what capacity he is employed by such party."

Stopping at this point, it is clear that under the Wisconsin Constitution, Wisconsin Statutes and Public Service Commission rules that the petitioner has the right to appear in hearings before the Public Service Commission of Wisconsin in a representative capacity.

Based upon this authority, the petitioner, as well as numerous other non-lawyers in the past, set up a business based upon representing transportation clients in regulatory matters before the Wisconsin Public Service Commis-

sion as well as before the Interstate Commerce Commission. He has carried on this activity for the past ten or more years.

Now then, the instant suit, the second in which we assume will be a series by the Integrated Bar of Wisconsin, finds the Supreme Court of Wisconsin stating that it has the exclusive jurisdiction to state what is the practice of law and who may practice the same. The other case was *State ex rel. Reynolds vs. Dinger* (1961) 14 Wis. 2d 193, which will hereinafter be discussed.

Both as a member of the Wisconsin Integrated Bar, and as attorney for petitioner, this writer, vehimently claims that the Supreme Court of Wisconsin does not have the power that it has asserted in the instant case.

The Integrated Bar of Wisconsin is under the organization and government of the Supreme Court of Wisconsin. To that extent the State Bar and Supreme Court are essentially one and the same. As such the petitioner here has in fact been judged by the exofficio governors of the plaintiff.

We believe the case absolutely parallels much of the discussion in the Sperry Case as follows:

In the Sperry Case it was clearly developed how the United States Constitution gave Congress the power to regulate commerce and make all laws necessary; how congress, under this power set up the Interstate Commerce Commission and authorized it to promulgate rules as to who may practice before it; and as to how the Interstate Commerce Commission set up rules permitting both lawyers and non-lawyers to practice.

In the instant case, the Wisconsin Constitution permits it's legislature to carry out the same function; the Wisconsin Legislature did set up the Public Service Commission as an administrative agency *of that Legislature*—not an agency of the court; and the Public Service Commission of Wisconsin permitted nonlawyers as "agents" to represent people before them.

This writer had always argued to the Wisconsin Supreme Court that there was a difference between "agents" and attorneys. We believe that the discussion in the Sperry Case clearly points out the distinction between an "agent" and an attorney.

Petitioner believes that the principal of *Dobbins vs. Los Angeles* (1904) 195 U. S. 223 is directly in point. There the City of Los Angeles adopted an ordinance in September fixing limits wherein a gas works could be constructed. Thereafter a permit was granted to petitioner to erect a gas work plant. In November, another city ordinance was passed amending the September ordinance and which November ordinance excluded the territory petitioner had purchased in reliance upon the September ordinance. There had been no change in the neighborhood or condition. This court held that the petitioner's permit and purchase of land with erection of the plant already started constituted a vested property right and that the second ordinance, which now excludes this land, was a deprivation of petitioneer's property without due process since the exclusion was unnecessary and without just cause.

This is exactly true in the instant case. Petitioner entered into his business based on the existing Wisconsin law that would permit him to do so. After doing it for ten

years, and with no reason to change, and no complaint against him, the plaintiff State Bar of Wisconsin started this suit to enjoin him. In order to do so, the Supreme Court of Wisconsin is required to change the law applicable.

In the original decision by the Wisconsin Supreme Court in the instant case they recognized, page 386, (19a) that "the Public Service Commission may countenance appearances before it by laymen," and on page 387 (20a) they, in respect to petitioner's qualifications stated "these practical qualifications in the instant case may be admitted without effecting the result."

Accordingly, we have a decision based upon a recognition of prior law that would permit petitioner's activities and a recognition of his qualifications.

To then proceed and enjoin him from furthering this work is a denial of due process.

(b) Equal protection:

This writer and petitioner feel that the injunction in this case is a definite denial of equal protection under the United States Constitution. Presumably the Wisconsin Supreme Court, by this decision, is setting a standard before people can be engaged in practice before the Public Service Commission. This standard is short, simple and to the point—*i.e. must be a lawyer.*

While we realize that legislation (judicial or otherwise) can require certain qualifications of persons engaged in certain professions or activities we submit however that any standard selected must not be unreasonable, arbitrary,

discriminatory or capricious and must have a reasonable relationship to the interest sought to be protected. *Nebbia vs. New York* (1933) 291 U. S. 502.

In view of the fact that there is no claim in this proceeding that the petitioner is not qualified, and in fact there appears to be an admission of his qualification, we submit that an injunction prohibiting him from doing the work he had been engaged in is contrary to the equal protection clause of the United States Constitution.

In *People vs. Schaeffer* (1923) 310 Ill. 574, 142 N. E. 248, the State of Illinois, by statute, required anyone practicing medicine must be a graduate of an accredited four year medical school. The statute then defined practice of osteopathy as the "practice of medicine." The Illinois Supreme Court held that the statute was unreasonable and discriminated against osteopaths because in requiring them to be graduates of medical schools, it required that they study therapeudics that were not a part of Osteopathic healing. The Illinois Supreme Court further noted that medical doctors were not required to study osteopathy and yet under the statute could practice osteopathy. Consequently, the Illinois Supreme Court held the statute violated the 14th Amendment of the Constitution.

In the instant case, the court is holding that the petitioner must have a law license before he can practice before the Wisconsin Public Service Commission. Nevertheless, this practice is merely administrative. There is no desire on the part of petitioner to probate any estate, obtain any divorces, try any negligence cases, defend any criminals or write any wills. These are the subjects normally

taught in law school. In fact, most law schools, including the University of Wisconsin Law School, have no course whatsoever regarding motor carrier transportation, and lawyers graduating therefrom may not be trained whatsoever in transportation and therefore less qualified than petitioner.

In *Schware vs. Board of Bar Examiners* (1956) 353 U. S. 232, this court said at pages 238 and 239:

> "A state cannot exclude a person from the practice of law *or from any other occupation* in a manner or for reasons that controvene the due process or equal protection clause of the XIV Amendment. (Citations). A court can require high standards of qualification such as good moral character, or proficiency in its law, before it admits an applicant to the bar, but any qualifications must have a rational connection with the applicant's fitness or capacity to practice law. (Citations).
>
> Even applying permissible standards, officers of a state cannot exclude an applicant where there is no basis for their finding that he fails to meet the standards or when their action is invideously discriminatory. (Citations)." (Emphasis added).

As against the position now taken by our Wisconsin Supreme Court, concerning administrative agency practice we set forth the citation from its decision in *Graywell Drilling Co. vs. State Board of Health* (1952) 263 Wis. 417 at page 419 as follows:

> "Not only pleadings, but all proceedings before administrative bodies are generally simple and informal. *The function of administrative agencies and courts are so different that the rules governing judicial proceedings are not ordinarily applicable to administrative agencies.*

unless made so by statute. *It is not the province of courts to prescribe rules of procedure for administrative bodies, as that function belongs to the Legislature.* The Legislature may prescribe rules for pleadings and procedure before such bodies, or it may authorize the administrative board or agency to prescribe its own rules." (Emphasis added).

Based on the foregoing, we see no reasonable relationship in requiring petitioner be a lawyer before he practices before the Public Service Commission. If he is qualified, he should be entitled to continue his practice in that field.

If there is any question concerning his qualifications, he should be permitted to take an examination. This decision does not provide for such, yet goes straight to the point —*i.e. must be a lawyer.*

Leaving petitioner's practice before the Public Service Commission momentarily, we will now discuss the case of *State ex rel. Reynolds vs. Dinger* (1961) 14 Wis. 2d 193. This is the case wherein the State Bar of Wisconsin was confronted with the question of whether execution of real estate forms by non-lawyer brokers constituted the practice of law and if so whether permissible by non-lawyers. The Wisconsin Supreme Court concluded the execution of real estate forms by non-lawyers did constitute the practice of law but nevertheless they permitted the non-lawyer brokers to do so. They permitted it under the theory that they have been doing it for a good number of years and therefore they will permit them to continue.

An analysis of these two cases is difficult to believe. In the *Dinger Case*, the court states filling out real estate forms such as deeds, land contracts, offers to purchase and

other conveyances is the practice of law but it will permit them to do it. In the instant case, the court states that practicing before an administrative agency is the practice of law and although you are qualified we will not permit you to do it. In the *Dinger Case*, the likelihood of a great number of brokers not being qualified is apparent. In the instant case the applicant's qualifications are admitted. This is not equal protection. This is discrimination in one of it's most arbitrary forms. In *Maxwell vs. Bugke* (1919) 250 U. S. 525 our court stated that equal protection of the law requires that all persons in like circumstances be treated equally—that the law apply equally in all circumstances.

We submit the instant case and the *Dinger Case* are absolutely contrary to that rule.

CONCLUSION

For the sake of simplicity, we have focused the foregoing argument on two primary issues. First, can a state court in any way limit or deny the right given a citizen of the United States under Congress and secondly, can a state court take away or deny a citizen of a state the rights that that state constitution and legislature gave him.

In respect to the first issue, believe that this is clear beyond any doubt, particularly in view of the Sperry Case and mandate previously issued in the instant case. In this respect, we specifically request this court to again grant certiorari on that issue and direct that the state court make no limitation whatsoever on the right of petitioner to carry out the activities authorized by Congress.

On the second issue, we pray that this court likewise grant certiorari. This is a substantial question.

Petitioner is a citizen of the United States. As such, he is entitled to equality and due process. There is no question but what the petitioner here, with others, had sufficient and appropriate authorization from the Wisconsin Constitution, Legislature and Public Service Commission to carry on the activities that this case presently enjoins him from doing. In enjoining him, our Supreme Court has had to "take the law in their own hands" and say that they have the exclusive jurisdiction, not the Legislature or Constitution, to determine what is the practice of law and who may practice. To come in and take this position as a basis for putting a man out of business when he was previously lawfully authorized to carry on his business is not due process.

To do as set forth above, and at the same time admit that the person is qualified to do what you are stopping him from doing, and not giving him the opportunity to pass any examinations or prescribe any standard is a denial of equal protection. The arbitrariness of the decision is shown by the comparison between the treatment given real estate brokers as compared to the petitioner.

Normally the issues in this second category, i.e. construction of state constitutions and legislation is a subject matter of a state court. However, this case does not construe the Wisconsin Constitution nor the Wisconsin legislation instead it point-blank states that notwithstanding them we, the Wisconsin Supreme Court, are the exclusive legislators of this subject.

Accordingly, we do not deem the decision in this case to be an interpretation of Wisconsin law but rather to be new legislation and as such violates both due process and equal protection which the petitioner, both as a citizen of Wisconsin and the United States is entitled to protection against.

We feel that the Supreme Court of the United States is the last hope of petitioner and we pray certiorari be granted on this issue also.

Respectfully submitted,

FRANK M. COYNE

Attorney for Petitioner

APPENDIX A

Applicable Provisions of United States Constitution

ARTICLE I

Section 8. The Congress shall have the power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

AMENDMENT ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its juriscition the equal protection of the laws.

Applicable United States Code Provisions

49 U. S. C., Section 17 (12) The Comimssion is authorized to promulgate reasonable rules and regulations relating to admission to practice before it, and is authorized to impose a reasonable fee for such admission, and such

fee shall be covered into the treasury of the United States as miscellaneous receipts.

Applicable Interstate Commerce Commission Rule
(Appendix F. C. A. 49, Rules of Interstate Commerce Commission)

The following classes of persons whom the commission finds, upon consideration of their application, to be of good moral character and possess the requisite qualifications to represent others may be admitted to practice before the commission: (a) Attorneys at Law . . . (b) PERSONS NOT ATTORNEYS . . . any person not an attorney at law who shall satisfy the commission that he is possessed of the necessary legal and technical qualifications to enable him to render valuable services before the commission and that he is otherwise competent to advise and assist in the presentation of matters before the commission.

APPENDIX B

21 Wis. 2d 100
OPINION OF THE
SUPREME COURT OF WISCONSIN
DATED OCTOBER 25, 1963
ON REHEARING ON REMAND FROM
SUPREME COURT OF THE UNITED STATES

STATE OF WISCONSIN ex rel. STATE BAR OF WISCONSIN, an association,

Appellant,

vs.

JOHN J. KELLER,

Respondent.

UPON REMAND FROM THE UNITED STATES SUPREME COURT

Quo warranto action against respondent John J. Keller to prevent usurpation of the franchise of practicing law. This court reversed an order of the circuit court for Winnebago county dismissing this action and remanded the cause with directions to enter a restraining order not inconsistent with our opinion. The opinion appears at 16 Wis. (2d) 377, 114 N. W. (2d) 796, 116 N. W. (2d) 141. Mr. Keller petitioned the supreme court of the United

States for a *writ of certiorari* and on June 10, 1963, the supreme court entered the following order, which is reported in 374 U. S. 102, 83 Sup. Ct. 1686, 10 L. Ed. (2d) 1026:

"PER CURIAM.

"The petition for writ of certiorari is granted, the judgment is vacated and the case is remanded to the Supreme Court of Wisconsin for reconsideration in light of *Sperry v. Florida ex rel. Florida Bar*, 373 U. S. 379."

The appellant has moved to modify the mandate of this court in accordance with the order of the supreme court of the United States.

PER CURIAM. We have, as required by the order of the supreme court of the United States, reconsidered this matter in the light of *Sperry v. State of Florida ex rel. The Florida Bar*.[1] We said in our original opinion that the Interstate Commerce Commission "can no more authorize persons unlicensed in this state to practice law here than could the public service commission of Wisconsin." To the extent that such statement is inconsistent with *Sperry*, it is withdrawn.

Sperry was registered to practice before the United States Patent Office but was not admitted to the bar of Florida. The supreme court of Florida enjoined Sperry from certain activities with respect to patent matters and from otherwise engaging in the practice of law in Florida. The supreme court of the United States determined that although the preparation and prosecution of patent appli-

[1] (1963), 373 U. S. 379, 83 S. Ct. 1322, 10 L. Ed. 2d 428.

cations for others constitute the practice of law and could, in the absence of federal statutes, be regulated by the states, the federal statutes permit the Commissioner of Patents to authorize nonlawyers to practice before the patent office. The commissioner has done so and the state's control over the practice of law within its borders must yield "to the limited extent necessary for the accomplishment of the federal objectives." The order of the supreme court of Florida was vacated since it prohibited Sperry "from performing tasks which are incident to the preparation and prosecution of patent applications before the patent office."

The court said, however:

> "Because of the breadth of the injunction issued in this case, we are not called upon to determine what functions are reasonably within the scope of the practice authorized by the Patent Office. The Commissioner has issued no regulations touching upon this point. We note, however, that a practitioner authorized to prepare patent applications must of course render opinions as to the patentability of the inventions brought to him, and that it is entirely reasonable for a practitioner to hold himself out as qualified to perform his specialized work, so long as he does not misrepresent the scope of his license."

The attorney general apparently concedes that Keller's license to practice before the Interstate Commerce Commission stands upon a footing similar to Sperry's authority to practice before the patent office, and that upon the authority of Sperry the courts of Wisconsin must not enjoin the holder of such license from activities in Wisconsin

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[footnote No. 4]

which constitute either representation of persons before the Interstate Commerce Commission or are incident to such representation.

It is clear enough that Keller's appearance as a representative of others at hearings of the Interstate Commerce Commission held in Wisconsin and his presentation of their matters at such hearings are authorized by his federal license and are not to be enjoined. The difficulty arises in determining what other activities within Wisconsin would be incident to a representation of clients before the Interstate Commerce Commission, whether the hearings were held in this state or elsewhere. We think that it is clear, following the reasoning of *Sperry*, that Keller is not to be enjoined from preparing in Wisconsin such applications to the Interstate Commerce Commission and similar documents of a type which would, in matters before that commission, be counterparts of pleadings in matters before a court. We think also that when clients consult him in Wisconsin about matters which they would like to have him submit to the Interstate Commerce Commission, he may give them opinions as to the impact upon their matters of the federal law and regulations which would govern the Interstate Commerce Commission in hearing and deciding such matters.

Counsel for Keller contends that there are a number of situations where persons engaged in interstate commerce would require the issuance of permits or other actions both by the Interstate Commerce Commission and the Public Service Commission of Wisconsin, and he argues that this subject matter relationship should make Keller's practice

before the Public Service Commission of Wisconsin an incident to his practice before the Interstate Commerce Commission. He also apparently takes the position that where leases and contracts must be approved by the Interstate Commerce Commission, such leases and contracts may be drawn by a practitioner licensed by that commission. We do not consider either contention correct. Although we recognize that he may advise whether a particular lease of contract complies with federal law or regulations, leases and contracts create substantive rights and obligations of parties and to prepare them and advise concerning their significance other than their standing under the interstate commerce laws and regulations would constitute the practice of law outside the scope of his practice before the Interstate Commerce Commission.

Our original opinion herein directed the issuance of an injunction restraining respondent from certain activities therein specified. To be proper under the *Sperry* decision and the order of the supreme court of the United States in this case, the injunction must be so drawn as to make clear that respondent Keller is not enjoined from the following activities:

1. Giving advice and instruction to persons informing them of their rights and obligations as to matters pending before the Interstate Commerce Commission or to be presented to said commission;

2. Preparing applications and other documents of a procedural nature for use in submitting matters to the Interstate Commerce Commission;

3. Appearing before said Interstate Commerce Commission at any hearings, formal or informal, even though within this state, and representing persons at such hearings as permitted by said commission;

4. Holding himself out as qualified to perform the foregoing services in Interstate Commission matters so long as he does not misrepresent the scope of his Interstate Commerce Commission license.

The injunction should, however, include a restraint against respondent performing any services in a representative capacity with respect to proceedings before the Wisconsin Public Service Commission.

Therefore, we enter a new mandate herein, as follows: Order reversed and cause remanded with directions to enter an injunction not inconsistent with the original opinion herein as modified by the memorandum on remand from the supreme court of the United States.

APPENDIX B

DECISION OF
SUPREME COURT OF THE UNTED STATES
ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN.
SUPREME COURT OF THE UNITED STATES

KELLER v. WISCONSIN ex rel. STATE BAR OF WISCONSIN

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

No. 429. Decided June 10, 1963.

PER CURIAM.

The petition for writ of certiorari is granted, the judgment is vacated and the case is remanded to the Supreme Court of Wisconsin for reconsideration in light of *Sperry v. Florida ex rel., The Florida Bar*, No. 322, Oct. Term, 1962, decided May 27, 1963.

APPENDIX B

16 Wis. 2d 377

OPINION OF THE
SUPREME COURT OF WISCONSIN
MAY 1, 1962

Rehearing denied June 29, 1962

STATE OF WISCONSIN, ex rel.,
STATE BAR OF WISCONSIN,

Appellant,

vs.

JOHN J. KELLER,

Respondent.

August Term, 1961—No. 193

APPEAL from an order of the circuit court for Winnebago County: HELMUTH F. ARPS, Circuit Judge. *Reversed with directions for judgment.*

The appellant attorney general, acting on relation of the State Bar of Wisconsin, an association, began a *quo warranto* action against respondent in circuit court for Winnebago County, alleging that respondent, a layman, had usurped and was continuing to usurp the franchise of practicing law. Respondent answered on the merits and appellant demurred to the answer. Respondent then moved for summary judgment dismissing the complaint. By an order

dated September 19, 1961, the circuit court dismissed this action upon the ground that such court has no jurisdiction over the subject matter.

The appellant submits that the circuit court had jurisdiction over the subject matter and should have tried the case on the merits, but regardless of where jurisdiction lies, the supreme court should not decide the case on the merits.

Further facts are stated in the opinion.

BROWN, J. Relator's complaint alleges that John J. Keller, respondent herein, a person not licensed to practice law in Wisconsin, performs numerous described services for others which constitute the practice of law. The complaint demands judgment adjudging that Keller has unlawfully usurped the privilege of practicing law and requiring him to cease and desist from such illegal practices. Keller answered to the merits. Neither party questioned the jurisdiction of the circuit court and each party submits that that court erred in deciding it was without jurisdiction.

It was the trial judge himself who questioned his court's jurisdiction over the subject matter. He based his determination on the decisions of *Lathrop v. Donohue* (1960), 10 Wis. (2d) 230, 102 N. W. (2d) 404, and *State ex rel. Attorney General v. Dinger* (1961), 14 Wis. (2d) 193, 109 N. W. (2d) 685, and language appearing in the opinions in those cases.

The circuit court's *quo warranto* jurisdiction is derived from sec. 8, art. VII, of the Wisconsin constitution:

> "*Circuit court, jurisdiction.* Section 8. The circuit courts shall have original jurisdiction in all matters

> civil and criminal within this state, not excepted in this constitution, and not hereafter prohibited by law; and appellate jurisdiction from all inferior courts and tribunals, and a supervisory control over the same. They shall also have the power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and all other writs necessary to carry into effect their orders, judgments and decrees, and give them a general control over inferior courts and jurisdictions."

It is evident that we misled the learned trial court, particularly by the statement in the opinion in *Dinger, supra*, at page 206, wherein we said that the regulation of the practice of law is a judicial power vested "exclusively" in the supreme court. At the moment we were contrasting conflicting claims of power by the legislature and judicial branches of the state government to regulate the practice of law. Holding, as we did, that the regulation of the practice of the law is a judicial power vested in the courts by the state constitution, the exercise of the power must *ultimately* lie in the supreme court. When the point of ultimate decision is reached the supreme court's power is and must be exclusive. Meanwhile, pending the supreme court's exercise of the power of regulation applicable to the facts of a given case, the power exists as a general judicial power to be shared by the courts subordinate to the supreme court. In the *Lathrop Case, supra*, the supreme court had made a regulatory order applicable to all members of the Wisconsin bar. The trial court there correctly held that it had no jurisdiction enabling it to pass upon the validity of the supreme court's order. Neither *Lathrop* nor *Dinger, supra*, deprives circuit courts of jurisdiction over attempts

of individuals to practice law who have not been admitted to such practice under the rules of the supreme court.

We regret that unintentionally we caused the learned trial court to conclude that the circuit courts lacked jurisdiction in such matters as are presently in question. Our language, particularly in the *Dinger* opinion, induced his error but as error we must reverse his order dismissing the complaint.

What ought to be done now is the next question. In his written decision the trial court stated that "There are no controverted issues of fact. A determination of the issues . . . involves purely a determination of issues of law." Respondent insists that the supreme court remand the cause for trial and decision by the circuit court, otherwise respondent is denied due process. However, respondent moved for summary judgment in circuit court. (Sec. 270.635, Stats.) The motion and respondent counsel's supporting affidavit alleges that counsel believes appellant's action has no merit. Counsel, being the able and learned lawyer which we know him to be, of course recognizes that summary judgment is granted only when there are no substantial issues of fact to be tried. *Prime Mfg. Co. v. A. F. Gallun & Sons Corp.* (1938), 229 Wis. 348, 281 N. W. 697; *Batson v. Nichols* (1951), 258 Wis. 356, 46 N. W. (2d) 192. Entry of summary judgment is proper where issues are legal rather than factual. *Phillips Petroleum Co. v. Taggart* (1955), 271 Wis. 261, 73 N. W. (2d) 482.

We have studied the pleadings and affidavits and reach the same conclusion that impelled respondent's counsel to conclude that the case is one proper and suitable for summary judgment, i.e. that the only issues here are legal.

Providing for summary judgments, sec. 270.635 (3), Stats., states:

> "Upon motion by a defendant, [for a summary judgment] if it shall appear to the court that the plaintiff is entitled to a summary judgment, it may be awarded to him even though he has not moved therefor."

Respondent, the defendant, previously moved in this court that the appeal be dismissed because the parties agreed that the circuit court had jurisdiction and the cause should be remanded for trial. We denied the motion saying:

> "The motion to dismiss appeal is denied and the motion to strike a portion of the plaintiff's brief is denied, it appearing that upon plaintiff's appeal this court has jurisdiction to review the refusal of the Circuit Court to sustain plaintiff's demurrer to the answer and, would, under Section 274.12 (2) Stats., have jurisdiction to review the failure of the Circuit Court to grant defendant's motion for summary judgment."

We remain of the same mind. The trial court and both parties assure us that were are no substantial issues of fact to be resolved by trial. The appeal has brought up the whole record. Only issues of law are presented. We consider that we may properly examine and determine the legal issues and to render such judgment as may be consistent with the determination.

> "While as a general rule this court may and does refuse to consider and dispose of questions not properly or timely presented for consideration of the trial court, as has been stated in a number of cases, among others [cases cited], yet as stated in *Dupont v. Jonet*, 165 Wis. 554, 558, 162 N. W. 664, and in *Cappon v. O'Day*, 165 Wis. 486, 162 N. W. 655, it unquestionably

has the power to and may consider the entire record and dispose of questions of law clearly presented on the record, . . ." *Braasch v. Bonde* (1926), 191 Wis. 414, 418, 211 N. W. 281.

". . . The general rule is that this court will not consider an assignment of error which is presented in this court for the first time but the court has the unquestioned power to consider the entire record and to dispose of questions of law clearly presented therein. *Braasch v. Bonde* (1926), 191 Wis. 414, 211 N. W. 281. Whether or not it will do so depends upon the circumstances of the case. . . ." *Estate of Zeimet* (1951), 259 Wis. 619, 622-623, 49 N. W. (2d) 924.

". . . Whether this court should review a question raised here for the first time depends upon the facts and circumstances disclosed by the particular record. It undoubtedly has the power, but ordinarily will not exercise it. The question is one of administration, not of power. . . ." *Cappon v. O'Day* (1917), 165 Wis. 486, 491, 162 N. W. 655.

This statement in *Cappon* by Mr. Justice Rosenberry, speaking for the court, applies equally well to the present situation where the questions were raised by the pleadings but where the trial judge had refrained from passing upon them. We consider that we may determine the case on the merits and our doing so does not infringe respondent's right to due process of law.

Thus we address ourselves to the merits as a question of law raised by undisputed facts. The issue is whether the admitted activities of respondent, as listed in the complaint, constitute the practice of law. Summarized, these activities, which respondent proposes to continue, are: Re-

spondent, admittedly not a member of the Wisconsin bar, has engaged in considerable activity before the Wisconsin Public Service Commission for the past seven years. He has made applications to the P. S. C. in behalf of his clients for authority to conduct trucking operations, handled proceedings on behalf of truckers with respect to such applications, appeared before the P. S. C. on behalf of various truckers and in opposition to the granting of permits to other truckers. In the course of these proceedings respondent has examined witnesses and taken such steps as necessary to make a record upon which formal action may be taken by the commission adjudicating the rights of the parties.

Respondent's answer pleads further facts: he is a licensed practitioner before the Interstate Commerce Commission, is also licensed by the Public Service Commission of Indiana, and he is familiar with the general rules of evidence, the leading cases involving the commerce clause of the constitution and the Interstate Commerce Act, and the principles of legal ethics. While admitting the practices of which he is accused, respondent's answer alleges:

> "(3) . . . that all activities which the plaintiff complains of against him were performed as a qualified layman and not an ordinary layman, and do not constitute the practice of law as defined and prohibited by Wisconsin Statutes Section 256.30.
>
> "(4) That the representation of clients in matters involving trucking in interstate commerce is the primary business of the defendant; that a considerable portion of the activities of the defendant in appearing before the Public Service Commission of Wisconsin and other administrative agencies of the State of Wis-

consin, all as alleged in the plaintiff's complaint, involve the rendering of professional advice and service incidental to said defendant's lawful interstate business.

"(5) The defendant alleges that all activities complained of in this complaint pertain to appearances before, or services in connection with, various administrative bodies of the State of Wisconsin; that the defendant has not and does not at any time whatsoever appear before any judicial tribunal or court of the State of Wisconsin, or any other state; that Chapter 195 Wisconsin Statutes and the Wisconsin Administrative Code specifically permits representation of people by agents other than attorneys before administrative agencies and that such representation does not constitute the practice of law as prohibited by Wisconsin Statutes Section 256.30."

Accordingly, he submits that what he has been doing does not constitute the practice of law as defined and prohibited by sec. 256.30 (2), Stats. Such section reads:

"Every person who shall appear as agent, representative or attorney, for or on behalf of an other person, or an firm, copartnership, association or corporation in any action or proceeding in or before any court of record, court commissioner, or judicial tribunal of the United States, or of any state, or who shall otherwise, in or out of court for compensation or pecuniary reward give professional legal advice not incidental to his usual or ordinary business, or render any legal service for any other person, or any firm, copartnership, association or corporation, shall be deemed to be practicing law within the meaning of this section."

Sec. 195.03 (1), Stats. 1959, which respondent cites, gives the P. S. C. power "to adopt rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings." Among these rules is Wis. Adm. Code--PSC 2.32, which provides:

> "Appearances. (1) A person desiring to participate in a proceeding, whether on his own behalf or as an authorized agent or attorney, shall enter his appearance by giving his name and address and the name of any party he represents and in what capacity he is employed by such party."

Respondent contends that this authorizes him to pursue the practices before the commission to which appellant objects as being the illegal practice of law.

The legislature's creation of the Public Service Commission with its rule-making powers does not in any way supersede the exclusive power of the judiciary, ultimately residing in the supreme court, to determine what is or is not the practice of law and to restrict such practice to persons licensed by the court to engage in it. For present purposes, at least, accepting respondent's interpretation of the scope of the P. S. C. Rule 2.32, the Commission can listen to or be advised by anyone it likes on any matters properly coming before that body. But *its* tolerance does not avert the consequences to an individual who is guilty of practicing law without a license. The admission of a person to practice law is constitutionally an exclusive power of the court and the attempt to exercise it by the legislature itself (or its agency) is unconstitutional and void. *In re Cannon* (1932), 206 Wis. 374, 240 N. W. 441; *State ex rel*

Attorney General v. Dinger (1961), 14 Wis. (2d) 193; 109 N.W. (2d) 685.

In the latter case we noted that real estate brokers had been filling out certain standard forms, a practice well known to the court for some one hundred years. The board recognized that practice and by rule somewhat circumscribed it, as a matter of regulating the brokers over which the board had jurisdiction. In so far as the selection and filling out of standard forms involved the practice of law it was by the supreme court's permission that the brokers might continue the limited practice until the court might withdraw the permission. It was the court not the board or its rule, which relaxed the prohibition against the practice of law by laymen and conferred upon brokers any right to continue such practice.

In like manner the Public Service Commission may countenance appearances before it by laymen but it may not by any rule or otherwise empower any person not licensed to practice law to practice it, or to grant immunity to one who does.

We hold, further, that the alleged lawfulness of respondent to engage in similar activities in other jurisdictions, such as in the State of Indiana or before the Interstate Commerce Commission, is immaterial in the case at bar. Respondent's activities in Wisconsin and his compliance or the lack of it with Wisconsin law are the controlling facts and the law applicable. Foreign bodies can no more authorize persons unlicensed in this state to practice law here than could the Public Service Commission of Wisconsin.

Respondent contends that by his study and experience he has become as well or better qualified than many licensed lawyers in the particular limited field in which he holds himself out to serve his clients, and his activities in that area should not be restrained. These practical qualifications in the instant case may be admitted without affecting the result. Beyond competency in a limited field the lawyer is subject to the discipline and control of the courts. There are obligations to his client and to the public under the supervision of the courts which are lacking in the case of any unlicensed person. We need not and we should not acknowledge a layman's right to practice law in a specialized field because the layman appears to be competent in it. Many an experienced legal secretary has qualifications in certain fields of the law superior to those of the newly-admitted law graduate but we do not consider it incumbent on the court to permit such an unlicensed expert to practice law in a specialty however narrow the specialty may be.

Neither do we think there is much virtue in respondent's disclaimer that he appears only before administrative agencies and never before any Wisconsin judicial tribunal or court. In the *Linger Case*, *supra*, at p. 202, we expressly disavowed the language and thought.

> ". . . that the court's interest in and powers of regulation and control of the practice of the law do not embrace and include the activities of persons, not licensed as attorneys, who may practice law outside of actions and proceedings in court. On the contrary, we hold that such broad power over the practice of law is a judicial power vested in the courts by sec. 2, art. VII of the state constitution."

And in the same case we held, at p. 206:

> ". . . that the regulation of the practice of the law is a judicial power and is vested exclusively in the supreme court; [and] that the practitioner in or out of court, licensed lawyer or layman, is subject to such regulation; . . ."

As we said earlier in this opinion, in *Dinger, supra*, we should have said that the regulation is exclusively a judicial power, residing ultimately in the supreme court.

Respondent has contended that to restrain him from continuing his present practices before the P. S. C. infringes his constitutional right to due process of law and equal protection of the law. We do not find that the United States Constitution assures him of a right to practice law in this state without being duly licensed by this court to do so nor does it protect him if he attempts it.

Relator's complaint asserts:

"VII.

"The practice of law comprises among other things, the following:

"(a) The giving of legal advice and instruction to clients to inform them of their rights and obligations.

"(b) The preparation for clients of documents requiring knowledge of legal principles not possessed by ordinary laymen.

"(c) The appearance for clients before public tribunals which possess power and authority to determine the rights of such clients according to law, in order to assist in the proper interpretation and enforcement of law."

We concur in the statement by appellant regarding the practice of law, set forth in the complaint at VII (a) and (b) above, and respondent should be enjoined from continuing such activities. As to VII (c), the respondent should be enjoined from appearing as an advocate for a client in respect to the client's legal rights and to procure an adjudication of legal rights desired by the client.

We do not consider that a layman is engaged in the practice of law when he investigates facts or procures evidence pertinent to his client's situation or to make reports thereon or testify thereto before a court or an administrative tribunal, and he may hold himself out as available to do such things, but he may not advise his client or others concerning the rights or liabilities arising from his investigation. "Giving advice as to legal rights is clearly the function of lawyers." *State ex rel. Junior Asso. of Milwaukee Bar v. Rice* (1940), 236 Wis. 38, 54, 294 N. W. 550. The investigator may communicate to his employer an opinion obtained from an attorney but he may not communicate the opinion of an attorney as his own. *Rice Case, supra*, p. 38.

We recognize that one not a licensed lawyer may by familiarity with an industry, such as the trucking industry, possess or acquire knowledge of value to a client, and may be in a position to give much technical non-legal advice to his client in such matters which does not constitute the practice of law.

Appellant is not demanding a penalty for past infractions of the principles just mentioned. For the future, an injunction should issue restraining respondent:

(a) from the giving of legal advice and instruction to clients to inform them of their rights and obligations;

(b) from the preparation for clients of documents requiring knowledge of legal principles not possessed by ordinary laymen; and

(c) from appearing as an advocate asserting legal rights for a client before public tribunals which possess power and authority to determine the rights of such clients according to law.

By the Court.—Order reversed and cause remanded with directions to enter a restraining order not inconsistent with the opinion.

APPENDIX B

DECISION OF CIRCUIT COURT FOR
WINNEBAGO COUNTY, WISCONSIN
September 6, 1961

STATE OF WISCONSIN, ex rel.,
STATE BAR OF WISCONSIN,

Plaintiff,

vs.

JOHN J. KELLER,

Defendant.

This is an action in the nature of quo warranto commenced by the Attorney General on relation of the State Bar of Wisconsin against the defendant, a layman, who is charged with usurping the franchise of practicing law by holding himself out to the public, and the trucking industry in particular, that he is engaged, among other things, in the business of making applications on behalf of others to the Public Service Commission of Wisconsin for authority to be granted to such applicants to conduct trucking operations, and to handle proceedings on behalf of truckers with respect to such applications, and to appear before that agency and other administrative agencies of the State Wisconsin on behalf of members of the trucking industry to obtain permits of various kinds necessary to the operation of the trucking business, and to oppose, if desired, the granting of such permits to others. In the course of such representations, defendant examines and cross-examines

witnesses before the Public Service Commission of the State of Wisconsin and takes such other steps and gives such counsel and advice as he deems necessary to make a record upon which formal action by the Commission determining the rights of others may be predicated.

Plaintiff contends that such representation by the defendant on behalf of applicant members of the trucking industry before the Public Service Commission and other administrative agencies in the State constitutes the practice of law by a non-lawyer.

The defendant by his answer to the amended complaint admits that he is not a lawyer (attorney) but contends that the services rendered by him for members of the trucking industrial before the Public Service Commission and other administrative agencies of the State of Wisconsin do not constitute the practice of law.

The plaintiff has demurred to the answer of the defendant, and the defendant, on the other hand, has moved for summary judgment of dismissal of the plaintiff's complaint.

There are no controverted issues of fact. A determination of the issues between plaintiff and defendant involves purely a determination of issues of law.

The matter was fully argued before this Court, and briefs have now been submitted. At the time of the oral arguments the Court on its own initiative raised the question of jurisdiction of a trial court to determine the issues involved, and invited counsel to submit briefs on such question. No question of jurisdiction of this trial court is raised by the pleadings. However, the question of jurisdiction is

one which need not be raised by the pleadings or by either of the parties to the litigation but is one which the Court may determine on its own incentive and its own motion. Unfortunately, the invitation of this Court to assist this Court on the jurisdictional question involved was overlooked or ignored in the briefs submitted.

DOES A TRIAL COURT (CIRCUIT COURT) HAVE JURISDICTION IN THIS MATTER?

A reading and somewhat careful study and analysis of the many cases cited in the submitted briefs—particularly those in the Supreme Court of Wisconsin—leaves this Court with the feeling that the issues presented in the instant case are not ones for a trial court to determine; rather, that a determination of such issues as are here presented is one solely within the jurisdiction of the Supreme Court of Wisconsin.

The Court is not unmindful of the procedure followed in *State ex rel. Junior Association of Milwaukee Bar v. Rice* (1940), 236 Wis. 38, where a similar issue of the defendant's activity as a "claims adjuster" was challenged by action commenced in the Circuit Court of Milwaukee County. That case was one of widespread interest, involving policy as to what constitutes the practice of law. The Circuit Court took jurisdiction, and the matter went to the Supreme Court on appeal. This Court has had occasion to examine Cases and Briefs submitted in the *Rice Case, supra*, and at no point, from an examination of the record on appeal and briefs filed, as shown in Cases and Briefs,

does it appear that either party question the jurisdiction of the Circuit Court at any stage of the proceedings.

However, this Court on its own motion takes notice of rules of law applicable, though not raised by either party, and particularly the rule laid down in the leading case of *State ex rel. Gaudynski v. Pruss*, 233 Wis. 600, where the rule is briefly stated as follows:

> "Parties may not either by stipulations or an application of the principle of estoppel confer on a court jurisdiction over the subject matter which it never had or which it lost." (*Id.* p. 604)

In *Fox River Paper Company v. International Brotherhood* 242 Wis. 113, the Court, in citing the *Gaudynski Case, supra*, uses this language:

> "'No principle of law is better established than that parties by agreement can not confer jurisdiction upon a court.'" (*Id.* p. 115)

In 21 C. J. S., Courts, p. 176, sec. 114, is found this statement:

> "A court is bound to take notice of the limits of its authority; and it is its right and duty to make a preliminary examination of its jurisdiction to entertain the cause, of its own motion, even though the question is not raised by the pleadings, or is not suggested by counsel. If the court finds at any stage of the proceedings that it is without jurisdiction it is its duty to take proper notice of the defect by staying the proceedings, dismissing, or other appropriate action." (*Id.* pp. 175-176)

The substance of this citation as it appears in 15 C. J., Courts, p. 852, sec. 171, was approved by the Supreme Court of Wisconsin in *Brickley v. Neuling*, 256 Wis. 324.

As the Supreme Court of the United States stated in *Morris v. Gilmer*, 9 Sup. Ct. 289-292; 129 U. S. 315; 32 L. Ed. 690:

"This rule is inflexible and without exception."

In *Lathrop v. Donohue* (1960), 10 Wis. (2d) 236, action was commenced in the Circuit Court of Fond du Lac County by plaintiff to recover from the defendant as Treasurer of the State Bar of Wisconsin the sum of fifteen dollars ($15.00), paid by the plaintiff under protest to the defendant as Treasurer of the State Bar of Wisconsin, to cover his annual dues to the State Bar for the calendar year 1959 as a condition of the plaintiff continuing in the practice of law in this State. A demurrer to the complaint was interposed, one of the grounds being that the court (Circuit Court of Fond du Lac County) lacked jurisdiction over the subject matter of the action in that exclusive jurisdiction thereof was vested in the Supreme Court of the State of Wisconsin. The trial court filed a memorandum decision in which the facts and the legal authorities were carefully and comprehensively considered; and determined that the demurrer must be sustained on all three grounds, including the jurisdictional ground of lack of authority of the Circuit Court of Fond du Lac County to determine the issues. In disposing of such matter, the Court, speaking through Justice Currie, page 234, says:

> "This court has determined to consider the constitutional issue raised on its merits and not to dispose of the appeal upon procedural grounds.

"While we are of the opinion that the learned trial court properly determined that the circuit court was without jurisdiction to pass upon the validity of an order of this court (Supreme Court) which regulates the practice of law; we will treat the action as though it had been originally and properly brought in this court. * * *"

In *State ex rel. John W. Reynolds, Attorney General, et al., petitioners, v. Julius J. Dinger, et al., as members of and constituting the Wisconsin Real Estate Brokers Board*, handed down by the Supreme Court of Wisconsin on June 27th, 1961, but which case does not have a citation at the time of this opinion being dictated, the Court makes this significant statement:

"We conclude that R. E. B. Rule 504 includes provisions which permit to a limited extent the practice of the law by certain non-lawyers; that the regulation of the practice of the law is a judicial power and is vested exclusively in the supreme court; that the practitioner in or out of court, licensed lawyer or layman, is subject to such regulation; that whenever the court's view of the public interest requires it, the court has the power to make appropriate regulations concerning the practice of law in the interest of the administration of justice, and to modify or declare void any such rule, law or regulation by whoever promulgated which appears to the court to interfere with the court's control of such practice or such end * * *"

This court concludes that the latest expressions of the Supreme Court of Wisconsin in *Lathrop v. Donohue, supra*, and in the *Real Estate Brokers Board Case, supra*, express the deliberate and considered view of the Supreme Court of Wisconsin that the promulgation of rules regulating the

practice of law is a function solely of the Supreme Court of Wisconsin and that such powers so to regulate the practice of law is not vested in the trial courts in this state.

For these reasons, this Court is now of the view that the Circuit Court of Winnebago County has no jurisdiction to determine the issues presented in this action on their merits, and that it would be completely improper for the trial court to gratuitously express its opinion on the merits of the controversy between the parties to this lawsuit.

Counsel for defendant may present for signature the proper order dismissing the plaintiff's action upon the ground that the Circuit Court of Winnebago County has no jurisdiction in the matter. No costs will be allowed on such dismissal.

Dated this 6 day of September, 1961.

HELMUTH F. ARPS
Helmuth F. Arps
Circuit Judge

APPENDIX C

(Material Portions of Record)

ORIGINAL COMPLAINT

I.

3 . The State Bar of Wisconsin is an association of all persons licensed to practice law in this state and said association was organized and created by order of the Wisconsin Supreme Court on December 7, 1956, 273 Wis. vii., and said association may sue and be sued.

II.

The defendant, John L. Keller, resides in the City of Neenah, Winnebago County, Wisconsin, and maintains an office at 201 West Wisconsin Avenue in said City of Neenah.

III.

By virtue of the Constitution heretofore duly adopted by the State of Wisconsin, there is created thereunder the Supreme Court. Now, and at all times herein mentioned, and pursuant to said constitutional provisions, there
4 is organized, ordained and existing a duly constituted tribunal known as "Supreme Court of Wisconsin." Among other inherent powers within the exclusive domain of said Supreme Court of Wisconsin, is the determination of who may engage in the professional field known as the "Practice of Law." Among its inherent powers, said Supreme Court has the sole and exclusive right and privilege of saying who shall be licensed and permitted to engage in the practice of law; and as an aid in determining said

question, a number of duly constituted legislatures of this state have prescribed certain guides or laws defining who may be entitled to engage in the practice of law. The right to the practice of the law is by sufferance and at the will of the Supreme Court of Wisconsin, and may be terminated at any time for violations of certain laws, or for violations of any of the Canons of Ethics applying to and binding on members of the profession, or for any good cause shown. No other agency has either power or right to license anyone to engage in the practice of the law, except said Supreme Court, since authority to admit to the bar and to disbar necessarily carries with it the power to define what constitutes the practice of the law, and to exclude unauthorized persons from it.

IV.

Under the laws of this state and under the rules of the Supreme Court of Wisconsin only a person who has met the tests and qualifications as to training and moral character prescribed and established by law is entitled to practice law and when he has been admitted to practice he becomes an officer of the court subject to its discipline and supervisory control. The legislature of this state has enacted into law sec. 256.30 of the Wisconsin statutes, providing that every person, who without having first obtained a license to practice law as an attorney of a court of record of Wisconsin, as provided by law, shall practice law as therein defined, including holding himself out as authorized to practice law, the giving of professional legal advice in or out of court for pecuniary reward not incidental to his usual or ordinary business, or the rendering of any legal service for any other person, shall be

guilty of a misdemeanor in addition to his liability to punishment as for a contempt, and in addition, the courts of this state always have had and now have the inherent power to restrain and punish for contempt any person engaging in the practice of the law without first being licensed so to do.

V.

One of the purposes of bar associations, such as the relator here, is to safeguard the proper professional interests of the members of the bar to the end that the public may be served in legal matters by a professional class qualified to render such service by reason of education, training, experience, examination and ethical discipline, and that the public be protected from those who pretend to be equipped to render and do render services constituting the practice of law but who have not met the rigid requirements imposed upon licensed attorneys, and who are not subject to the discipline and supervisory control of the courts.

VI.

The defendant has never been admitted to the bar of the State of Wisconsin and has never been licensed to practice law in this state, but nevertheless has engaged in the practice of law systematically and continuously during the period of more than three years last past and is now so engaged, and thereby the defendant has wrongfully and illegally usurped and exercised a franchise, to wit, the privilege of practicing law. On information and belief during the period referred to the defendant has engaged in the

practice of law by holding to the public and the trucking industry in particular that he is engaged among other things in the business of making applications to the Public Service Commission of applications for authority to operate trucking operations, assignments, sales and purchases, the preparation of contracts and leases, the handling of cases with the various state departments, the obtaining of operating authority, fuel permits, or special permits in other states, the providing of proper representation "at Madison and Washington" and the providing of a legal and administrative service center for the trucker. While on complaint of the plaintiff the defendant has agreed to discontinue such advertising he has nevertheless persisted and now persists in the practice of law by the drafting and filing of trucking leases with the Motor Carrier Division of the Public Service Commission of Wisconsin and by appearing for and representing truckers in hearings before such agency in the course of which he examines witnesses and takes such steps as he may deem necessary to make a record upon which formal action by said Commission adjudicating the rights of parties may be predicated. In addition thereto said defendant in the course of said practice issues legal opinions to his so-called "clients," and all of the aforesaid services have been and are being rendered for compensation.

VII.

The practice of law comprises among other things, the following:

(a) The giving of legal advice and instruction to clients to inform them of their rights and obligations.

(b) The preparation for clients of documents requiring knowledge of legal principles not possessed by ordinary laymen.

(c) The appearance for clients before public tribunals which possess power and authority to determine the rights of such clients according to law, in order to assist in the proper interpretation and enforcement of law.

All of the activities of the defendant as hereinbefore set forth in para. VI of this complaint come within the above classification of practice of the law and unless restrained by the court, the defendant will, by virtue of the acts, facts and circumstances hereinbefore set forth, in all probability continue in such practices. Said activities have been conducted openly and notoriously and in disregard of the rights of the public as well as those for whom and on whose behalf this action is brought.

7. WHEREFORE, the State of Wisconsin demands judgment adjudging that the defendant has unlawfully usurped a franchise, viz., the privilege of practicing law; ordering the defendant to cease and desist immediately and permanently from such illegal practice and requiring the defendant to pay the costs and disbursements of this action in addition to a fine of $2,000.00 as provided in Section 294.13, Wis. Stats., and for such other and further judgment, order or relief as under the circumstances may be just and proper.

DEMURRER

13 Comes now the defendant, by his attorney Frank M. Coyne, and demurrers to plaintiff's complaint on the following grounds and reasons:

(1) Defendant claims the Court lacks jurisdiction over the subject matter of the alleged activities of defendant insofar as they pertain to claim of defendant "obtaining special permits in other states"; "the providing of proper representation at . . . Washington" or, as they pertain to any alleged activities in respect to representing persons in, before, or about any administrative or legislative agencies or tribunals without the state of Wisconsin.

(2) Defendant claims the complaint does not state facts sufficient to constitute a cause of action for the reason that all alleged activities of defendant, other than those covered by (1) above, pertain to services in connection with administrative departments or tribunals of the State of Wisconsin; and for the further reason that there is no claim that the activities alleged were not incidental to defendants ordinary and usual business, to wit, licensed Interstate Commerce Practitioner in connection with transportation matters.

Dated November 4, 1960.

15 AMENDED COMPLAINT

(Formal Parts Omitted)

John W. Reynolds, Attorney General of the State of Wisconsin, brings this action in the name of the state against the above named defendant, upon complaint of the State Bar of Wisconsin, an association created by order of the Supreme Court of Wisconsin, which association consists of all persons licensed to practice law in the State of Wisconsin, and for cause of action alleges:

I.

The State Bar of Wisconsin is an association of all persons licensed to practice law in this state and said association was organized and created by order of the Wisconsin Supreme Court on December 7, 1956, 273 Wis. vii., and said association may sue and be sued.

II.

The defendant, John J. Keller, resides in the City of Neenah, Winnebago County, Wisconsin, and maintains an office at 201 West Wisconsin Avenue in said City of Neenah.

III.

By virtue of the Constitution heretofore duly adopted by the State of Wisconsin, there is created thereunder the Supreme Court. Now and at all times herein mentioned, and pursuant to said constitutional provisions, there is
16 organized, ordained and existing a duly constituted tribunal known as "Supreme Court of Wisconsin." Among other inherent powers within the exclusive domain of said Supreme Court of Wisconsin, is the determination of who

may engage in the professional field known as the "Practice of Law." Among its inherent powers, said Supreme Court has the sole and exclusive right and privilege of saying who shall be licensed and permitted to engage in the practice of law; and as an aid in determining said question, a number of duly constituted legislatures of this state have prescribed certain guides or laws defining who may be entitled to engage in the practice of law. The right to the practice of the law is by sufferance and at the will of the Supreme Court of Wisconsin, and may be terminated at any time for violation of certain laws, or for violations of any of the Canons of Ethics applying to and binding on members of the profession, or for any good cause shown. No other agency has either power or right to license anyone to engage in the practice of the law, except said Supreme Court, since authority to admit to the bar and to disbar necessarily carries with it the power to define what constitutes the practice of the law, and to exclude unauthorized persons from it.

IV.

Under the laws of this state and under the rules of the Supreme Court of Wisconsin only a person who has met the tests and qualifications as to training and moral character prescribed and established by law is entitled to practice law, and when he has been admitted to practice he becomes an officer of the court subject to its discipline and supervisory control. The legislature of this state has enacted into law Sec. 256.30 of the Wisconsin Statutes, providing that every person, who without having first obtained a license to practice law as an attorney of a court of record of Wisconsin, as provided by law; shall practice

law as therein defined, including holding himself out as authorized to practice law, the giving of professional legal advice in or out of court for pecuniary reward not incidental to his usual or ordinary business, or the rendering of any legal service for any other person, shall be guilty of a misdemeanor in addition to his liability to punishment at or for a contempt, and in addition, the courts of this state always have had and now have the inherent power to restrain and punish for contempt any person engaging in the practice of law without first being licensed so to do.

V.

One of the purposes of bar associations, such as the relator here, is to safeguard the proper professional interests of the members of the bar to the end that the public may be served in legal matters by a professional class qualified to render such service by reason of education, training, experience, examination, and ethical discipline, and that the public be protected from those who pretend to be equipped to render and/or to render services constituting the practice of law but who have not met the rigid requirements imposed upon licensed attorneys, and who are not subject to the discipline and supervisory control of the courts.

VI.

The defendant has never been admitted to the bar of the state of Wisconsin and has never been licensed to practice law in this state, but nevertheless has engaged in the practice of law systematically and continuously in the re-

spects hereinafter alleged during the period of more than three years last past and is now so engaged, and thereby the defendant has wrongfully and illegally usurped and exercised a franchise, to wit, the privilege of practicing law. On information and belief during the period referred to the defendant has engaged in the practice of law by holding out to the public and the trucking industry in particular that he is engaged among other things in the business of making applications to the Public Service Commission of Wisconsin for authority to conduct trucking operations and to handle proceedings on behalf of truckers with respect to such applications and to appear before that agency and other administrative agencies in the state or elsewhere on behalf of members of the trucking industry to obtain permits of various kinds necessary to the operation of the trucking business and to oppose, if desired, the granting of such permits to others. Plaintiff further alleges that in the course of such practice the defendant has at all times material hereto appeared in a representative capacity on behalf of members of the trucking industry in proceedings and hearings before the Wisconsin Public Service Commission and that in the course of such representation he has examined and cross-examined witnesses and has taken such steps as he deems necessary to make a record upon which formal action by said commission adjudciating the rights of parties may be predicated. Plaintiff alleges that in general defendant has at all times material hereto performed the services and engaged in the procedures and practices coming within the scope of Ch. PSC 2 of the administrative rules of said Public Service Commission as published in Vol. 5 of the Wisconsin Ad-

ministrative Code and defendant claims the right to continue to do so unless lawfully restrained by a court of competent jurisdiction.

VII.

The practice of law comprises among other things, the following:

(a) The giving of legal advice and instruction to clients to inform them of their rights and obligations.

(b) The preparation for clients of documents requiring knowledge of legal principles not possessed by ordinary laymen.

(c) The appearance for clients before public tribunals which possess power and authority to determine the rights of such clients according to law, in order to assist in the proper interpretation and enforcement of law.

All of the activities of the defendant as hereinbefore set forth in para. VI of this complaint come within the above classification of practice of the law and unless restrained by the court, the defendant will, by virtue of the acts, facts and circumstances hereinbefore set forth, in all prob-
19 ability continue in such practices. Said activities have been conducted openly and notoriously and in disregard of the rights of the public as well as those for whom and on whose behalf this action is brought.

WHEREFORE, the State of Wisconsin demands judgment adjudging that the defendant has unlawfully usurped a franchise, viz., the privilege of practicing law; ordering the defendant to cease and desist immediately and permanently from such illegal practice and requiring the defend-

ant to pay the costs and disbursements of this action and for such other and further judgment, order or relief as under Ch. 294, Wis. Stats., or otherwise may be just and proper.

21 ANSWER TO AMENDED COMPLAINT

(Formal parts omitted)

COMES NOW the defendant by Frank M. Coyne, his attorney, and makes the following his answer to plaintiff's complaint.

(1) Admits the allegations of paragraphs I and II of plaintiff's complaint.

(2) Answering paragraph III, admits that the Supreme Court of Wisconsin has been created under the Wisconsin Constitution and is in existence; admits that said Supreme Court of Wisconsin does have a power to determine who may engage in the practice of law and that it may terminate a license or privilege given to anyone to practice law; denies, however that the Supreme Court of Wisconsin has the power, either inherently or otherwise, to exclusively determine what constitutes the practice of law.

(3) Answering paragraph IV and V, admits the allegations contained therein.

(4) Answering paragraph VI, admits that the defendant has not been admitted to the State Bar of Wisconsin as an attorney; admits that he has engaged in the specific activities set forth in said paragraph, to-wit; making
22 applications before the Public Service Commission of Wisconsin for authority to conduct trucking operations,

and otherwise appearing before said agency and other administrative agencies in connection with obtaining permits for operation of trucking business and the opposing of permits to others; admits that he has so appeared in a representative capacity and that in so doing he has examined and cross-examined witnesses and that he has performed services and engaged in the procedures and practices within the scope of PSC 2, Wisconsin Administrative Code; admits that he claims that he has the right to do so and denies that his participation in these activities constitutes the practice of law as prohibited by Wisconsin Statutes 256.30 or otherwise.

(5) Answering paragraph VII, admits that the practice of law can comprise, among other things, the items set forth in subparagraphs (a) and (b) but denies that these elements in themselves constitute the practice of law, alleging that they may be performed by persons other than lawyers under certain circumstances and within certain rights; and denies that appearance before "public tribunals" constitute the practice of law as defined and prohibited by Wisconsin Statutes 256.30.

AFFIRMATIVE DEFENSES

As and for separate affirmative defenses to the plaintiff's complaint the defendant alleges as follows:

(1) That the Supreme Court of the State of Wisconsin has the sole right and power to regulate and qualify those persons who participate in the administration of the law in actions and proceedings in courts of law and equity; that the legislature of the State of Wisconsin has the sole right and power to regulate and qualify those persons who participate in the administration of the law in actions and proceedings outside of courts of law and equity under its police power in order to protect the public interest and welfare; that this separation of authority between the judiciary and the legislature is guaranteed by the separation of powers doctrine in the Wisconsin Constitution; that all of the activities of the defendant, as alleged in the plaintiff's complaint and admitted to by the defendant, constitute the administration of the law outside of courts of law and equity and are, thus, solely within the legislature's sphere of regulation.

(2) That the defendant is a duly licensed practitioner before the Interstate Commerce Commission of the Government of the United States in connection with matters pertaining to trucking and motor carrier operations; that in being so licensed, defendant was required to and did pass a written examination wherein his qualifications in respect to the knowledge of legal principles applicable to the trucking industry generally were inquired into, as well as the general rules of procedure and evidence governing the handling of matters before said commission; that the de-

fendant is well qualified to serve the public and in particular, the trucking industry, in the capacity and activities as alleged in the plaintiff's complaint.

(3) The defendant alleges that all activities which the plaintiff complains of against him were performed as a qualified layman and not an ordinary layman, and do not constitute the practice of law as defined and prohibited by Wisconsin Statutes Section 256.30.

(4) That the representation of clients in matters involving trucking in interstate commerce is the primary business of the defendant; that a considerable portion of the activities of the defendant in appearing before the Public Service Commission of Wisconsin and other administrative agencies of the State of Wisconsin, all as alleged in the plaintiff's complaint, involve the rendering of professional advice and service incidental to said defendant's lawful interstate business.

(5) The defendant alleges that all activities complained of in this complaint pertain to appearances before, or services in connection with, various administrative bodies of the State of Wisconsin; that the defendant has not and does not at any time whatsoever appear before any judicial tribunal or court of the State of Wisconsin, or any other state; that Chapter 196 Wisconsin Statutes and the Wisconsin Administrative Code specifically permits representation of people by agents other than attorneys before administrative agencies and that such representation does not constitute the practice of law as prohibited by Wisconsin Statutes Section 256.30.

(6) The defendant alleges that a determination, as plaintiff requests that the defendant's alleged activities constitute the practice of law as defined by Wisconsin Statutes, or otherwise, would deny the defendant due process and equal protection of the law as guaranteed by the Wisconsin and the United States Constitution in that it would be imposing a standard that is arbitrary and discriminatory with no reasonable relationship to the interests sought to be protected, and that it does not apply equally to all persons of the same class, to-wit: persons possessing equal qualifications.

WHEREFORE, the defendant prays that the plaintiff's complaint be dismissed with prejudice and without cost to either party.

FRANK M. COYNE
Attorney for Defendant

DEMURRER TO DEFENDANTS ANSWER TO AMENDED COMPLAINT

The plaintiff demurs to the defendant's Answer to the Amended Complaint and to all alleged defenses thereiff on the grounds that no defense is stated to the Amended Complaint herein.

29 MOTION FOR SUMMARY JUDGMENT

(Formal parts omitted)

COMES NOW the defendant by his attorney Frank M. Coyne and pursuant to Section 270.635 Wisconsin Statutes, and based upon the pleadings herein, affidavits annexed hereto and Wisconsin and United States law applicable thereto moves the court for judgment dismissing the plaintiff's complaint, and al causes of action thereunder on its merits.

Dated April 27, 1961.

30 AFFIDAVIT OF FRANK M. COYNE

(Formal parts omitted)

Frank M. Coyne being first duly sworn on oath, deposes and states that he is attorney for the defendant herein; that he is familiar with all the pleadings on file herein and facts set forth in defendant's personal affidavit and that he believes that the plaintiff's action has no merit.

Dated April 27, 1961.

31 AFFIDAVIT OF JOHN J. KELLER

(Formal parts omitted)

John J. Keller, being first duly sworn on oath, deposes and states that he is the defendant herein and makes this affidavit in support of a motion for summary judgment.

(1) Affiant states that he is an adult resident of the State of Wisconsin and maintain an office at 201 West Wisconsin Avenue, in the city of Neenah.

(2) Affiant states that his primary, usual and ordinary business is the representation of clients in connection with the transportation business in Interstate Commerce; that he has been licensed by the Interstate Commerce Commission of the United States Government to so represent such parties before said commission in all matters relating to transportation operations, he being so licensed on October 4, 1961 and being a member in good standing of said Commission's Bar since said date.

(3) Affiant states that in obtaining the aforementioned license to practice before said Interstate Commerce
32 Commission affiant was compelled to undergo a written examination as to his qualifications so to practice; that said written examination tested affiant's qualifications and knowledge as to (1) structur and history of the Interstate Commerce Act, as amended, and related acts, (2) the Commission's rules of practices, (3) the general rules of evidence, (4) the leading cases involving the Commerce Clause of the Constitution and the Interstate Commerce Act and their significance; and (5) the principles of legal ethics; that affiant passed said written examination, was issued his license and has practiced under it continuously to date.

(4) Affiant states that his representation of transportation clients in Interstate Commerce involves the preparation of applications for filing with that Commission, the appearance at hearings before said Commission with the presentation of appropriate facts to support granting of

such applications, the application of principles of evidence, cross-examination of witnesses and thorough knowledge of transportation operations and rules and regulations applicable thereto; that in addition, said practice, in interstate commerce, requires preparation and filing with the Interstate Commerce Commission of appropriate bilateral contracts, lease agreements, rate schedules, tariffs, registration of equipment and related documents; that the handling of all said matters and the preparation of all said documents before the Interstate Commerce Commission are matters for which he has been properly qualified and licensed by Interstate Commerce Commission.

(5) That in respect to appearances before the Public Service Commission of Wisconsin and the Motor Vehicle Department and other related administrative agencies in the State of Wisconsin, as are complained of in this
33 action, certain of his appearances, acts and activities are in direct continuance or completion of services rendered for said clients in interstate commerce, to wit, obtaining of conforming authority or compliance authority from the Public Service Commission and registration of equipment and preparation and filing of appropriate leases of equipment with the Motor Vehicle Department; that in respect to said appearances all are appearances and acts pertaining to his client's operations in interstate commerce with the applications, acts and activities being performed before the named administrative agencies of the State of Wisconsin being in furtherance of the completion of said interstate matters, and as such a part of affiant's usual and normal occupation.

(6) Affiant states that in connection with all other appearances before the Public Service Commission of Wisconsin or the handling of matters before the Motor Vehicle Department or any other administrative agency of the State of Wisconsin as complained of in this action, that all said appearances, acts or activities are limited strictly to the representations of parties in connection with the transportation business; that in said respect affiant states that the rules of procedure preparation of documents and regulations governing are very comparable to rules and regulations of the Interstate Commerce Commission; that he has openly appeared before the Public Service Commission of Wisconsin in respect to the representation of transportation clients for more than seven years and without any objection thereto; that he had during said period of time
34 prepared necessary documents pertaining to leasing of equipment, filing of rate schedules and tariffs and other documents as required by said Wisconsin administrative agencies; affiant states that he is thoroughly familiar with all rules, regulations and procedures governing all of the activities that he engages in before said administrative agencies and that he is thoroughly qualified and competent so to do.

(7) Affiant states that in connection with the activities complained of in this action in respect to the representation of transportation clients that he does not appear before any court of record, court commissioner or judicial tribunal in representation of a client in this State or elsewhere nor does he hold himself out to represent any client or party in any court or judicial tribunal of any type in this state or elsewhere.

(8) Affiant states that he had been licensed to appear before the Public Service Commission of Indiana under Rule V (d) of said commission Rules and Regulations concerning practice and procedure, and also been permitted to appear before other comparable regulatory bodies of several other states on transportation matters.

35 (9) Affiant states that all activities pertaining to representation of clients before the Public Service Commission, Motor Vehicle Department and other administrative agencies of the State of Wisconsin as complained of in this action were performed by him as a qualified practitioner and that a general legal education is not required to carry on said activities and that he is ready, willing and able to submit himself to examination as to qualifications in connection with and limited to the performance of the acts and activities complained of.

ORDER DISMISSING ACTION

(Formal parts omitted)

42 IT IS HEREBY ORDERED that the plaintiff's complaint be dismissed upon the ground that the Circuit Court of Winnebago County has no jurisdiction over the subject matter, no costs to be allowed.

Dated September 19, 1961 by the Court.

H. F. ARPS.
Judge

45 NOTICE OF APPEAL TO WISCONSIN SUPREME COURT

(Formal parts omitted)

MOTION OF RESPONDENT

50 Comes now respondent, by his attorney, Frank M. Coyne and moves the Court as follows:

(1) Moves the court to strike issue Number 2 and argument thereon from appellant's brief on the ground that it is not properly before the court in that:

(a) The trial court has made no determination on said issue and therefore such is not appealable within this court's appellate jurisdiction.

(b) It is not properly before this court as a matter of original jurisdiction.

(2) Moves the Court dismiss appellant's appeal as to issue Number 1 and remand the matter to Circuit Court of Winnebago County for the reason that no dispute exists between appellant and respondent on said issue.

51 RULING ON MOTION

The motion to dismiss appeal is denied and the motion to strike a portion of the plaintiff's brief is denied, it appearing that upon plaintiff's appeal this court has jurisdiction to review the refusal of the circuit court to sustain plaintiff's demurrer to the answer and would, under sec. 274.12 (2), Stats., have jurisdiction to review the failure of the circuit court to grant defendant's motion for summary judgment.

MOTION FOR REHEARING
(Formal parts omitted)

Comes now the Respondent, by his attorneys, Frank M. Coyne and James E. Quackenbush and, pursuant to Rule 37 of the Rules of Practice In The Supreme Court, moves the Court for a rehearing of the above capitioned matter, and reversal or modification of its decision of May 1, 1962 herein, for reasons to be stated in briefs to be submitted under Rule 39.

Dated May 14, 1962.

MOTION FOR REHEARING DENIED
(Formal parts omitted)

Motion for rehearing denied without costs.

APPENDIX C

(MOTIONS TO SUPREME COURT OF WISCONSIN UPON REMAND FROM THE UNITED STATES SUPREME COURT)

(Motion of appellant State Bar of Wisconsin)

MOTION TO CORRECT MANDATE

The above entitled appeal having been disposed of by this court in 16 Wis. 2d 377, 114 N. W. 2d 796, by a decision dated May 1, 1962, and the respondent having petitioned the Supreme Court of the United States for Writ of Certiorari, Supreme Court of the United States, October Term, 1962, No. 429, and said Court having entered the following per curiam opinion on June 10, 1963:

> "The petition for writ of certiorari is granted, the judgment is vacated and the case is remanded to the Supreme Court of Wisconsin for reconsideration in light of Sperry v. Florida ex rel. The Florida Bar, No. 322, Oct. Term, 1962, decided May 27, 1963";

NOW THEREFORE, The attorneys for the appellant herein respectfully move this Court for an order amending the opinion on file herein by inserting a paragraph at the end of the opinion just before the final paragraph revising the order and remanding the cause with directions to enter a restraining order not inconsistent with the opinion, said proposed pargraph to read as follows:

> "Said restraining order, however, should contain a provision to the effect that nothing contained therein is to be construed as enjoining the respondent from per-

forming tasks which he may lawfully perform under any license issued to him by the Interstate Commerce Commission. See *Sperry v. Florida* (May 27, 1963) 373 U. S. —, 83 S. Ct. 1322, 10 L. Ed. 2d 428, and *Keller v. Wisconsin ex rel. State Bar of Wisconsin*, U. S. Supreme Court No. 429, Oct. Term, 1962 (June 10, 1963), — U. S. —, 83 S. Ct. 1686, — L. Ed. —."

(Motion of Respondent Keller)

COMES NOW Respondent, John J. Keller, by his attorney, Frank M. Coyne, and pursuant to the decision of the Supreme Court of the United States on Writ of Certiorari, October Term, 1962, No. 429, in the above matter hereby moves the Supreme Court of Wisconsin to render it's decision on reconsideration in the above entitled matter as follows:

(1). Moves the court to dismiss the complaint of appellant-plaintiff against the respondent-defendant on it's merits.

(2) In the event of denial of the foregoing motion, then respondent moves that the court make whatever decision it renders inapplicable to the defendant John J. Keller and hold that said decision is applicable prospectively only to all non-attorney agents not actively engaged in practice before the Wisconsin Public Service Commission on May 1, 1962.

APPENDIX D

Applicable Provisions of Wisconsin Constitution

ARTICLE IV

Section 1. The legislative power shall be vested in a senate and assembly.

ARTICLE V

Section 1. The executive power shall be vested in a governor, who shall hold his office for two years; a lieutenant governor shall be elected at the same time, and for the same term.

ARTICLE VII

Section 2. The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace. The legislature may also vest such jurisdiction as shall be deemed necessary in municipal courts, and shall have power to establish inferior courts in the several counties, with limited civil and criminal jurisdiction. Provided, that the jurisdiction which may be vested in municipal courts shall not exceed in their respective municipalities that of circuit courts in their respective circuits as prescribed in this constitution; and that the legislature shall provide as well for the election of judges of the muncipal courts as of the judges of inferior courts; by the qualified electors of the respective jurisdictions. The term of office of the judges of the said municipal and inferior courts shall not be longer than that of the judges of the circuit courts.

Section 3. The supreme court, except in cases otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state;

but in no case removed to the supreme court shall a trial by jury be allowed. The supreme court shall have a general superintending control over all inferior courts; it shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other original and remedial writs, and to hear and determine the same.

Section 20. Any suitor, in any court of this state, shall have the right to prosecute or defend his suit either in his own proper person, or by an attorney or agent of his choice.

ARTICLE XIV

Section 13. Such parts of the common law as are now in force in the Territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature.

Applicable Provisions of Wisconsin Statutes

227.01 (1) "Agency" means any board, commission, committee, department or officer in the state government, except the governor or any military or judicial officer of this state.

227.08 Each agency shall adopt rules governing the form, content, and filing of pleadings, the form, content and service of notices, the conduct of prehearing conferences, and other necessary rules of procedure and practice.

195.03 (1) (Applicable to Public Service Commission.) The Commission shall have power to adopt rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings; and all hearings shall be open to the public.

194.20 Motor carriers operating in interstate and foreign commerce shall obtain certificates and licenses, amend-

ments thereto, and approval of the assignment thereof, as provided in ss. 194.23, 194.25 and 194.34, but the issuance thereof shall not be predicated upon findings in respect to public convenience and necessity. Certificates, licenses, amendments thereto and approval of assignments thereof which involve operations in interstate and foreign commerce may be denied by the commission if it finds that the record and experience of the applicant evinces a disposition to violate or evade the laws or regulations of the state applicable to the operations proposed by him.

194.03 (4) Motor carriers operating in interstate and foreign commrece shall obtain permits, and display evidence thereof as required by the motor vehicle department in the same manner as is required of motor carriers operating in intrastate commerce.

251.08 The supreme court shall have and exercise an appellate jurisdiction only, except when otherwise specially provided by law or the constitution, which shall extend to all matters of appeal, error or complaint from the decisions or judgments of any of the circuit courts, county courts or other courts of record and shall extend to all questions of law which may arise in said courts upon a motion for a new trial, in arrest of judgment, or in cases reserved by said courts.

251.10 In addition to the writs mentioned in section 3 of Article VII of the constitution the supreme court shall have power to issue writs of prohibition, supersedeas, procedendo and all other writs and process not specially provided by statute which may be necessary to enforce the due administration of right and justice throughout the state; and any justice of said court in vacation shall, on good cause shown, have power to allow writs of error, supersedeas and certiorari, and also to grant injunctional orders.

256.30 (2) Every person who shall appear as agent, representative or attorney for or on behalf of any other

person, or any firm, copartnership, association or corporation in any action or proceeding in or before any court of record, court commissioner, or judicial tribunal of the United States, or of any state, or who shall otherwise, in or out of court for compensation or pecuniary reward give professional legal advice not incidental to his usual or ordinary business, or render any legal service for any other person, or any firm, copartnership, association or corporation, shall be deemed to be practicing law within the meaning of this section.

274.09 (1) Appeals to the supreme court may be taken from the circuit courts unless expressly denied and also from the county courts except where express provision is made for an appeal to the circuit court and from any court of record having civil jurisdiction when no other court of appeal is provided. Appeals may be taken from interlocutory judgments.

274.09 (2) Said right of appeal applies to final orders and judgments rendered upon appeals from or reviews of the proceedings of tribunals, boards and commissions, and to final judgments and orders whether rendered in actions or in special proceedings without regard to whether the action or proceeding involves new or old rights, remedies or proceedings and whether or not the right to appeal is given by the statute which creates the right, remedy or proceeding.

Applicable Public Service Commission Rule

P. S. C. 2.32 (1) A person desiring to participate in a proceeding, whether on his own behalf or as an authorized agent or attorney shall enter his appearance by giving his name and address and the name of any party he represents and in what capacity he is employed by such party.

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In The

Supreme Court of the United States

October Term, 1963

No. 744

JOHN J. KELLER,

Petitioner,

vs.

STATE OF WISCONSIN ex rel.
STATE BAR OF WISCONSIN,
an association,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In The

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No. .....

JOHN J. KELLER,

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vs.

STATE OF WISCONSIN ex rel.
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Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent does not agree with the petitioner on the scope of the questions presented and as set forth by petitioner at pages 3 and 4 of his brief.

It is the position of the respondent that only one very narrow question is properly before the court here, stated as follows:

QUESTION PRESENTED

Does the decision of the Wisconsin Supreme Court dated October 25, 1963, 21 Wis. 2d 100, 123 N. W. 2d 905, conflict with the decision of the United States Supreme Court in the case of *Sperry v. Florida, ex rel. Florida Bar* (May 27, 1963) 373 U. S. 379, 83 S. Ct. 1322, 10 L. Ed. 2d 1026?

All questions which could properly be raised here on Petition for Certiorari in this case were presented to the court in the petitioner's prior petition for a writ of certiorari herein and which was disposed of by this cour in its order of June 10, 1963, reported in 374 U. S. 102, 83 S. Ct. 1686, 10 L. Ed. 2d 1026, as follows:

"PER CURIAM.

"The petition for writ of certiorari is granted, the judgment is vacated and the case is remanded to the Supreme Court of Wisconsin for reconsideration in light of Sperry v. Florida ex rel. The Florida Bar, 373 U. S. [379], 83 S. Ct. 1322 [10 L. Ed. 2d 428]."

REASON FOR DENYING THE WRIT

THE DECISION OF THE WISCONSIN SUPREME COURT ON REMAND FROM THIS COURT IS IN COMPLETE ACCORD WITH THE DECISION OF THIS COURT IN FLORIDA ex rel. THE FLORIDA BAR

It is apparent from the decision of the Wisconsin Supreme Court that it gave very careful reconsideration to its prior decision in the light of the *Sperry* decision pursuant to the order of this court in remanding the case.

I.

SPERRY DECISION INVOLVED ONLY PRACTICE BEFORE A FEDERAL AGENCY

In *Sperry* it was held that registration in the patent office did not authorize the general practice of law but sanctioned only those services which are reasonably necessary and incident to the preparation and prosecution of patent application.

> "* * * He does not claim that he has any right otherwise to engage in activities that would be regarded as the practice of law. * * * We granted certiorari, 371 U. S. 875, 83 S. Ct. 148, 9 L. Ed 2d 113, to consider the significant, but narrow, questions thus presented." (p. 1324 of 83 S. Ct.)

It was conceded in *Sperry* that the states generally have the power to regulate the practice of law but that in the exercise of that power they cannot hinder or obstruct the free use of a license granted under an Act of Congress. It was not contended in *Sperry* as it is contended by the petitioner here that a license to practice before a federal administrative agency confers the right to practice before a state administrative agency in a case or proceeding in which interstate commerce may be incidentally involved.

II.

THE ONLY PORTION OF THE ORIGINAL DECREE OF THE WISCONSIN SUPREME COURT WHICH NEEDED MODIFICATION IN THE LIGHT OF SPERRY WAS THE ORDER TO THE TRIAL COURT DIRECTING IT TO ENJOIN PETITIONER "FROM APPEARING AS AN ADVOCATE ASSERTING LEGAL RIGHTS FOR A CLIENT BEFORE PUBLIC TRIBUNALS WHICH POSSESS POWER AND AUTHORITY TO DETERMINE THE RIGHTS OF SUCH CLIENTS ACCORDING TO LAW" (quoted from 16 Wis. 2d 377 at 390)

In *Keller* the action arose out of petitioner's practice before the Public Service Commission of Wisconsin, hereinafter referred to as the P. S. C. The Wisconsin Supreme Court made this clear at p. 384 of 16 Wis. 2d 377, 384, 114 N. W. 2d 796, 799, when it said:

> "Thus we address ourselves to the merits as a question of law raised by undisputed facts. The issue is whether the admitted activities of respondent, as listed in the complaint, constitute the practice of law. Summarized, these activities, which respondent proposes to continue, are: Respondent, admittedly not a member of the Wisconsin bar, has engaged in considerable activity before the Wisconsin public service commission for the past seven years. He has made applications to the P. S. C. in behalf of his clients for authority to conduct trucking operations, handled proceedings on behalf of truckers with respect to such applications, appeared before the P. S. C. on behalf of various truckers and in opposition to the granting of permits to other truckers. In the course of these proceedings respondent has examined witnesses and taken such steps as necessary to make a record upon

which formal action may be taken by the commission adjudicating the rights of the parties."

The petitioner sought to justify his practice because he was licensed by the interstate commerce commission, hereinafter referred to as the I. C. C.

Admittedly the portion of the decree quoted in the heading of this section of the brief was too broad in the light of *Sperry* as would be the reasoning offered in support of that portion of the decree wherein the court said at 16 Wis. 2d 377, 387, 114 N. W. 2d 796, 801:

> "We hold, further, that the alleged lawfulness of respondent to engage in similar activities in other jurisdictions, such as in the state of Indiana or before the interstate commerce commission, is immaterial in the case at bar. Respondent's activities in Wisconsin and his compliance or the lack of it with Wisconsin law are the controlling facts and the law applicable. Foreign bodies can no more authorize persons unlicensed in this state to practice law here than could the public service commission of Wisconsin."

It is respectfully submitted that the foregoing language is amply corrected by the language in the court's present decision wherein it said at 21 Wis. 2d 100 at pp. 102-3, 123 N. W. 2d 905, 907:

> "'It is clear enough that Keller's appearance as a representative of others at hearings of the interstate commerce commission held in Wisconsin and his presentation of their matters at such hearings are authorized by his federal license and are not to be enjoined. The difficulty arises in determining what other activities within Wisconsin would be incident to a representation of clients before the interstate commerce com-

mission, whether the hearings were held in this state or elsewhere. We think that it is clear, following the reasoning of *Sperry*, that Keller is not to be enjoined from preparing in Wisconsin such applications to the interstate commerce commission and similar documents of a type which would, in matters before that commission, be counterparts of pleadings in matters before a court. We think also that when clients consult him in Wisconsin about matters which they would like to have him submit to the interstate commerce commission, he may give them opinions as to the impact upon their matters of the federal law and regulations which would govern the interstate commerce commission in hearing and deciding such matters."

In accordance with this language the Wisconsin Supreme Court modified its previous directions for an injunctional order by stating at p. 104 of its decision in 21 Wis. 2d 100 that the petitioner should not be enjoined from the following activities:

"1. Giving advice and instruction to persons informing them of their rights and obligations as to matters pending before the interstate commerce commission or to be presented to said commission;

"2. Preparing applications and other documents of a procedural nature for use in submitting matters to the interstate commerce commission;

"3. Appearing before said interstate commerce commission at any hearings, formal or informal, even though within this state, and representing persons at such hearings as permitted by said commission;

"4. Holding himself out as qualified to perform the foregoing services in interstate commerce commission matters so long as he does not misrepresent the

scope of his interstate commerce commission license." (123 N. W. 2d 905, 907.)

This clearly places the petitioner on exactly the same footing as *Sperry* so far as his rights under a federal license are concerned.

III.

THE PETITIONER HAS NO CONSTITUTIONAL RIGHT TO PRACTICE BEFORE THE P. S. C. BY VIRTUE OF HIS I. C. C. LICENSE.

The Wisconsin Supreme Court's decision on remand from this court provides in addition to matters hereinbefore discussed the following directive to the trial court:

> "The injunction should, however, include a restraint against respondent's performing any services in a representative capacity with respect to proceedings before the Wisconsin public service commission." 21 Wis. 2d 100, 104, 123 N. W. 2d 905, 907.

There is, of course, nothing whatsoever in *Sperry* which states or even hints that the holder of a license to practice before a federal agency has the right to also practice before a state administrative agency by virtue of his federal license.

The scope of an I. C. C. practitioner's authority is set forth in petitioner's brief here on petition for writ of certiorari at pp. 12-13 where reference is made to the federal statute authorizing the I. C. C. to promulgate reasonable rules and regulations relating "to practice before *it*." (Emphasis added.)

See 49 U. S. C. Sec. 17 (12) and Rule 8 of the commission's practice rules which states:

> "The following classes of persons whom the Commission finds, upon consideration of their application, to be of good moral character and possess the requisite qualifications to represent others may be admitted to practice *before the Commission*: (a) Attorneys-at-law —(b) PERSONS NOT ATTORNEYS—any person not an attorney-at-law who is a citizen or resident of the United States and who shall satisfy the Commission that he is possessed of the necessary legal and technical qualifications to enable him to render valuable services *before the Commission* and that he is otherwise competent to advise and assist in the presentation of matters *before the Commission*." (Emphasis added.)

Thus it is to be noted that the sole scope of the federal regulation covers practice *before the I. C. C.* and not before the P. S. C. of Wisconsin or any other agency or court.

Perhaps in closing it might be well to point out a fundamental distinction between the *Sperry* and *Keller* cases.

Sperry so far as material here dealt with a matter over which Congress has exclusive control and has pre-empted the field, the issuance of patents. On the other hand Congress does not have exclusive control over all commerce, interstate and intrastate, and there is nothing whatsoever in *Sperry* which indicates in any way that a state may not in the exercise of its police power set up a state regulatory commission such as the P. S. C. and regulate practice before it either by legislation or through the inherent and supervisory control of the Wisconsin Supreme Court over the practice of law as set forth in the original Wisconsin Su-

preme Court decision herein, 16 Wis. 2d 377, 114 N. W. 2d 796.

CONCLUSION

We have purposely limited this brief to the directive of the United States Supreme Court on remand, namely, reconsideration of the original decision in the light of *Sperry*.

The right of a state supreme court to regulate the practice of law if such regulation does not hinder or obstruct the free use of a license granted under an Act of Congress was conceded in *Sperry*, and we do not consider or understand the mandate of this court to go beyond a direction to the Wisconsin Supreme Court to review its own decision in the light of the *Sperry* case for the purpose of correcting any language or order of the Wisconsin court which might impinge upon petitioner's rights under his I. C. C. license.

State control over the practice of law has been thoroughly canvassed by this court in an earlier case from Wisconsin, *Lathrop v. Donohue*, 10 Wis. 2d 230, 102 N. W. 2d 404, 367 U. S. 820, 81 S. Ct. 1826, rehearing denied October 9, 1961, 82 S. Ct. 23. There is no point in attempting now to reargue the constitutional right of the states to define and regulate the practice of law. The only point presently involved is whether a license to practice before a federal agency also authorizes the licensee to practice before state administrative agencies. If petitioner is right in his contentions here as to the scope of his I. C. C. license, it would follow that he could no more be precluded from

practicing before a state court than he could be precluded from practicing before a state administrative agency.

The Wisconsin Supreme Court has faithfully and fully complied with the mandate of this court.

The petition for a Writ of Certiorari herein should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 749

JOHN J. KELLER, PETITIONER

v.

STATE OF WISCONSIN ex rel. STATE BAR OF WISCONSIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted, pursuant to this Court's order of February 17, 1964, inviting the Solicitor General to file a brief:

> * * * expressing the views of the United States on the extent of the authority granted by a license to practice issued by the Interstate Commerce Commission as applied to the activities in this case.

1. Petitioner, who is not a lawyer and has not been licensed to practice law in Wisconsin where he resides, was admitted to practice before the Interstate Com-

merce Commission of the United States, pursuant to Rule 1,8 of the Commission's General Rules of Practice.[1] Petitioner's primary business is the representation of clients engaged in interstate transportation by motor vehicle. He represents such clients before the Commission, as well as before the Public Service Commission and the Motor Vehicle Department of Wisconsin. A "considerable portion" of his activities before the State agencies involves the rendering of professional advice and service connected with his interstate business (Pet. App. 45a-46a).

The Attorney General of Wisconsin brought this action in the name of the State, upon complaint of the State Bar of Wisconsin, praying for a judgment declaring that petitioner has engaged in the unlawful practice of law and for an order that he cease and

---

[1] Rule 1.8 of the General Rules of Practice of the Interstate Commerce Commission provides (49 C.F.R. 1.8):

> The following classes of persons whom the Commission finds, upon consideration of their applications, to be of good moral character and to possess the requisite qualifications to represent others may be admitted to practice before the Commission:
>
> (a) *Attorneys at law.* Attorneys at law who are admitted to practice before the highest court of any State or Territory or the District of Columbia.
>
> (b) *Persons not attorneys.* Any person not an attorney at law who is a citizen or resident of the United States and who shall satisfy the Commission that he is possessed of the necessary legal and technical qualifications to enable him to render valuable service before the Commission, and that he is otherwise competent to advise and assist in the presentation of matters before the Commission.

desist from such activities (Pet. App. 37a-42a). Petitioner answered, admitting the basic facts, and raising as an affirmative defense his license to practice before the Interstate Commerce Commission (Pet. App. 42a-46a). The case was submitted on the State's demurrer to his answer and his motion for summary judgment (Pet. App. 46a-51a).

The Supreme Court of Wisconsin sustained the position of the State Attorney General, and broadly enjoined petitioner from engaging in what it described as the unauthorized practice of law, 16 Wis. 2d 377, 114 N.W. 2d 796, 116 N.W. 2d 141 (Pet. App. 10a-23a). Following the decision in *Sperry* v. *Florida*, 373 U.S. 379, this Court issued the following order on petitioner's first petition for a writ of certiorari (374 U.S. 102):

> The petition for writ of certiorari is granted, the judgment is vacated and the case remanded to the Supreme Court of Wisconsin for reconsideration in light of *Sperry* v. *Florida ex rel. Florida Bar*, 373 U.S. 379.

On remand, the Supreme Court of Wisconsin ruled (21 Wis. 2d 100, 123 N.W. 2d 905, Pet. App. 3a-8a):

(1) Petitioner is entitled to represent others at hearings of the Interstate Commerce Commission held in Wisconsin, to prepare "applications to the Interstate Commerce Commission and similar documents of a type which would, in matters before that commission, be counterparts of pleadings in matters before a court," and to advise clients in Wisconsin "as to the impact upon their matters of the federal law and reg-

ulations which would govern the Interstate Commerce Commission in hearing and deciding such matters" (Pet. App. 6a);

(2) Petitioner's authorization to practice before the Interstate Commerce Commission does not authorize him to represent others in proceedings before the Public Service Commission of Wisconsin (Pet. App. 7a);

(3) The drafting of leases and contracts which must be approved by the Interstate Commerce Commission, and the rendering of advice "concerning their significance other than their standing under the interstate commerce laws and regulations would constitute the practice of law outside the scope of his practice before the Interstate Commerce Commission" (Pet. App. 7a).

2. In our view, the authority granted by the Interstate Commerce Commission to practitioners under its present rules of practice does not exceed that accorded to petitioner by virtue of the second decision of the Supreme Court of Wisconsin in this case. As that court recognized, the right to practice before the Commission includes not only the right to make actual appearances before the Commission, but also the authority to give advice and counsel as to matters which are or may be before the Commission, and prepare applications and other papers for use in submitting matters to the Commission (Pet. App. 7a-8a).

We also agree that the admission to practice before the Commission, under the present rules of practice, does not confer upon the holder of such a license the right to practice before State regulatory agencies, even

in regard to matters concerning interstate transportation (Pet. App. 6a-7a).

Lastly, we believe that the admission to practice before the Commission neither authorizes nor prohibits the drafting of contracts and leases which require its approval. Accordingly, in our view, the issue of whether the drafting of such documents constitutes the unauthorized practice of law is a matter for resolution between the States and the persons drafting the documents.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission.

MAY 1964.

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In The

Supreme Court of the United States

October Term, 1963

No. 749

JOHN J. KELLER,

Petitioner,

vs.

STATE OF WISCONSIN ex rel.,
STATE BAR OF WISCONSIN,
an association,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES

REPLY TO MEMORANDUM OF SOLICITOR GENERAL

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In The

Supreme Court of the United States

October Term, 1963

No. 749

JOHN J. KELLER,

Petitioner,

vs.

STATE OF WISCONSIN ex rel.,
STATE BAR OF WISCONSIN,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

REPLY TO MEMORANDUM OF SOLICITOR GENERAL

This memorandum is submitted in reply to the memorandum by the Solicitor General in the above matter, pursuant to order entered February 17, 1964.

Petitioners admission to practice before the Interstate Commerce Commission is a license or privilege granted under authority of an Act of Congress, 49 USC Section 17

(1). Such admission carries with it the implied power and privilege to do those things that are necessary to carry out the authority given to petitioner.

The Solicitor General's memorandum contains no citations and this writer is not aware of any specific decision directly on point with the instant question. However, I believe the general rule is applicable and set forth the same as given in American Jurisprudence, Volume 50, Page 449, Section 428 as follows:

> IMPLIED POWERS, RIGHTS, AND PRIVILEGES.—"There are some powers, rights and privileges which may be derived from statutory grants by implication. This is true where such powers, rights and privileges are given by necessary implication. Thus, where a statute grants a right, it also confers by implication every particular power necessary for the exercise thereof. In this respect, it has been held that an express statutory grant of a right, power or privilege carries with it by implication, in the absence of a limitation, all the means that are usually employed and that are necessary and proper to the exercise or enjoyment of the right, power or privilege granted. In such case the power necessarily implied is a part of the legislative act. . . ."

I again refer to the petition filed by petitioner in this matter on pages 14 and 15. It is clear from those two pages that the drafting of such leases and contracts is a necessary part of representation of a transportation client before the Interstate Commerce Commission. As such, his admission carries the implied power to draft the same and under *Sperry v. Florida, ex rel., Florida Bar* 373 U. S. 379 the Wisconsin Supreme Court cannot deny petitioner such right.

Lastly, the Solicitor General's memorandum acknowledged that the Interstate Commerce Commission admission *does not prohibit* the drafting of leases and contracts. Accordingly, petitioner, who has been drafting them and preparing them in the past under his license, has been doing it legally. As such, the basic argument set forth in our main petition regarding due process and equal protection apply and we again submit that the decision of the Supreme Court of Wisconsin, which would now take this non-prohibited right away from petitioner, is contrary to the 14th Amendment of the United States Constitution.

Respectfully submitted,

FRANK M. COYNE
Attorney for Petitioner